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EDITOR'S NOTE

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o. 84-1661-CFH Title: Irwin I. Kimmelman, Attorney General of New Jersey, et al., Petitioners
tatus: GRANTED v.
Neil Morrison

ocketed:
pril 18, 1985 Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Nodes, Allan Joseph

Counsel for respondent: Staehle, William Ernest

ntry	Date	Note	Proceedings and Orders
1	Apr 18 1985	G	Petition for writ of certiorari filed.
2	May 20 1985		Brief amicus curiae of Iowa, et al. filed.
3	May 21 1985		DISTRIBUTED. June 6, 1985
4	Jun 3 1985	R	Response requested.
5	Jul 3 1985		Brief of respondent Neil Morrison in opposition filed.
6	Jul 3 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Jul 10 1985		REDISTRIBUTED. September 30, 1985
8	Aug 10 1985	X	Reply brief of petitioner Kimmelman, Atty. Gen. of NJ filed.
9	Oct 7 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Oct 7 1985		Petition GRANTED.
			**********
11	Oct 11 1985	G	Motion of respondent for appointment of counsel filed.
12	Oct 15 1985		DISTRIBUTED. Oct. 18, 1985. (Motion of respondent for appointment of counsel).
13	Oct 21 1985		Motion for appointment of counsel GRANTED and it is ordered that William E. Staehle, Esquire, of Chatham, New Jersey, is appointed to serve as counsel for the respondent in this case.
14	Nov 4 1985		Record filed.
15	Nov 4 1985		Certified copy of appendix and partial C. A. proceedings received.
16	Oct 29 1985		Application for release filed.
17	Oct 31 1985		Response requested. Due 11/4/85 COB.
18	Nov 2 1985		Response filed.
19	Nov 4 1985		Application for release denied by Brennan, J.
20	Nov 4 1985		Record filed.
21	Nov 4 1985		Certified copy of appendix & partial C. A. proceedings received.
22	Nov 21 1985		Brief of petitioner Kimmelman, Atty. Gen. of NJ filed.
23	Nov 27 1985		Joint appendix filed.
24	Dec 19 1985		Brief of respondent Neil Morrison filed.
25	Dec 20 1985		Brief amicus curiae of ACLU, et al. filed.
26	Jan 7 1986		CIRCULATED.
27	Jan 7 1986		SET FOR ARGUMENT, Wednesday, March 5, 1986. (2nd case)
28	Mar 5 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

NO. 84-1661

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY and JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,

Petitioners,

vs.

NEIL MORRISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Whether *Stone* v. *Powell* bars a claim of ineffective assistance of counsel on habeas corpus review, where the alleged Sixth Amendment violation is grounded solely in counsel's failure to move to suppress evidence allegedly seized in violation of petitioner's Fourth Amendment rights.

2. Whether a Fourth Amendment claim which is barred under *Wainwright* v. *Sykes* may be asserted in a federal habeas corpus action in order to determine whether a Sixth Amendment violation has occurred.

3. Whether the fact findings of a state judge concerning the weight he accorded evidence in a bench trial are entitled to the presumption of correctness under 28 U.S.C. sec. 2254(d).

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY and JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,

Petitioners,

vs.

NEIL MORRISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The opinion of the Superior Court of New Jersey, Appellate Division, affirming respondent's conviction and is appended at petitioners' Appendix at Pa12. The order of the New Jersey Supreme Court denying respondent's petition for certification is appended at petitioners' Appendix at Pa15. The opinions of the United States District Court

and the United States Court of Appeals for the Third Circuit are reported: *Morrison* v. *Kimmelman*, 579 F.Supp. 796 (D.N.J. 1981), vac. and rem., 752 F.2d 918 (3d Cir. 1985), reh. den. —— F.2d —— (3d Cir. 1985), and are appended at petitioners' appendix Pa18 and Pa1.

Jurisdiction

The Judgment of the Court of Appeals was entered on January 18, 1985. A timely petition for rehearing *en banc* was denied on February 19, 1985, and this present petition has been filed within sixty (60) days of that date pursuant to Rule 20.1 and 20.4, Rules of the Supreme Court. The Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. sec. 1254(1).

Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Code, Title 28, Section 2254(d).

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondents shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

New Jersey Court Rule 3:5-7.

(a) Notice; Time. On notice to the prosecutor of the county in which the matter is pending or threatened, to the applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply to the Superior Court only and in the

county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within a jurisdiction of the municipal court. Such motion shall be made within 30 days after the initial plea to the charge unless the court, for good cause shown, enlarges the time. A motion made before the trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto. . . .

(f) Consequences of Failure to Move. If a timely motion is not made in accordance with this rule, the defendant shall be deemed to have waived any objection during trial to the admission of evidence on the ground that such evidence was unlawfully obtained.

New Jersey Court Rule 3:22-1.

Any person convicted of a crime may, pursuant to this rule, file with the county clerk of the county in which the conviction took place a petition for post-conviction relief captioned in the action in which the conviction was entered.

New Jersey Court Rule 3:22-5.

A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceedings brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings.

Statement of the Case

Respondent owned a fish store and employed the victim, 15 year old Marjorie Jones, after school hours. (1T19-7 to 1T22-7).[1] On the night of October 13, 1977, he took her with him while he made several deliveries. (1T23-14 to 1T29-19). Thereafter respondent took the victim to his apartment. After several visitors departed, respondent asked the victim to join him on the bed. (1T33-4 to 1T38-14). She refused. He forced her to submit by twisting her arm. (1T38-16 to 1T39-19). He also muffled her screams for help by placing his hand over her mouth. (1T40-4 to 6). Respondent pushed the victim's jeans and underpants down, inserted his penis in her vagina and completed an act of sexual intercourse. (1T40-7 to 1T41-7). Respondent then drove the victim back to his place of business which was next door to the victim's home. (1T41-19 to 1T42-13).

The victim's mother was alerted by her daughter's unusual behavior. (2T17-2 to 25). After a few questions, the victim informed her mother that respondent had forcibly induced her to have sexual intercourse. (2T18-2 to 9; 2T20-3 to 10).

Police were immediately summoned. (2T20-11 to 25). The girl's mother reported the crime and gave the girl's

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[1] T designates the trial transcripts.

MT refers to the motion transcript of August 3, 1979.

PCR refers to the hearing transcript of July 24, 1982.

Aa refers to petitioners' appendix filed with the Court of Appeals.

Sa refers to petitioners' supplemental appendix filed with the Court of Appeals.

Pa refers to petitioners' appendix filed with this Court.

underpants to the police for laboratory analysis. (2T24-4 to 24). The victim was transported to the hospital where she was medically examined. (2T31-2 to 25).

Shortly thereafter, just hours after the rape, the victim led the police officers to the scene of the crime, respondent's apartment. (2T99-17 to 22). Detective Dolores Most knocked on the door but there was no answer. (2T100-2 to 7). At that point, a neighbor appeared and verified that the apartment belonged to the respondent. The neighbor opened the unlocked door and the police officers went inside. (2T100-8 to 19). The police found no one inside the apartment. Detective Most seized a bedsheet from respondent's bed. (2T102-23 to 2T103-1).

Laboratory tests were conducted on the bedsheet which had been seized from respondent's apartment, and the victim's underpants which were independently obtained from the victim. Both the bedsheet and the underpants contained seminal stains which tested positive for blood group O, the same blood group as that of respondent. (3T129-4 to 8; 4T23-23 to 4T24-20; 4T75-7 to 13; 4T77-19 to 22; 4T78-20 to 24). In addition, head hairs found on the bedsheet were found to compare morphologically with samples taken from respondent and from the victim. (4T 153-21 to 25). Finally, tests on vaginal samples of the victim performed at the hospital showed the presence of sperm. (4T26-7 to 25; 4T28-21 to 25).

On March 14, 1978, respondent was charged in Passaic County Indictment No. 369-78 with carnal abuse, contrary to the provisions of N. J. Stat Ann. 2A:138-1 (Count One); rape, contrary to the provisions of N. J. Stat. Ann. 2A:138-1 (Count Two); impairing the morals of a minor, contrary to the provisions of N. J. Stat. Ann. 2A:96-3 (Count Three); and private lewdness, contrary to the provisions of N. J. Stat. Ann. 2A:115-1 (Count Four). A bench trial

was conducted before the Honorable William J. Marchese, J.S.C., between March 13, and 20, 1979. Defense counsel moved to suppress evidence seized from respondent's apartment during trial. This motion was denied. The court ruled that the motion was procedurally barred for failure to file timely prior to trial pursuant to New Jersey Court Rule 3:5-7(f). (Aa20-18 to 22). On March 20, 1979, respondent was adjudged guilty on all counts. On June 7, 1979, respondent was sentenced to an eight to ten year term of imprisonment for rape. He also received concurrent terms of six to eight years for carnal abuse, two to three years for impairing the morals of a minor and one to two years for private lewdness.

On July 24, 1979, respondent filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division.

On August 3, 1979, respondent moved before the Honorable William J. Marchese, J.S.C., for bail pending appeal. This motion was denied. (MT16-6 to 19). The court ruled in this regard that the claim of an illegal search was not a substantial issue for appellate review which would be likely to cause reversal. The judge specifically found that the evidence from the bedsheet seized from respondent's apartment "was just one small phase in this whole case." (Aa33).

Defendant raised the following issues to the Appellate Division: the convictions should be merged, ineffective assistance of counsel, and the trial court erred in refusing to permit a suppression motion during trial.

On March 18, 1981, the Appellate Division affirmed respondent's conviction for rape, finding that trial counsel was competent and that the trial court correctly refused to permit the suppression motion at trial, but merged the remaining three charges into the rape conviction.

Respondent thereafter filed a Petition for Certification with the Supreme Court of New Jersey, claiming ineffective assistance of counsel. On May 18, 1981, the Supreme Court of New Jersey denied the petition. (Pa15).

On July 29, 1982, respondent sought post-conviction relief in the Superior Court of New Jersey, Law Division, pursuant to N. J. Court Rule 3:22-1, raising the same issues as had been raised on direct appeal. Such relief was denied on procedural grounds, as all issues had been raised on direct appeal. N. J. Court Rule 3:22-5. (PCR50-16 to 21).

On April 27, 1983, respondent filed a petition for a writ of habeas corpus, raising claims of ineffective assistance of counsel and the erroneous admission of illegally seized evidence at trial. On June 13, 1983, petitioners filed a motion to dismiss the petition. On December 20, 1983, a hearing on the petition and motion to dismiss the petition was held before the Honorable Herbert J. Stern, U.S.D.J. Judge Stern denied the motion to dismiss the petition. (Aa75).

On January 30, 1984, Judge Stern ordered that unless the State of New Jersey began proceedings to retry respondent within 90 days of the order, a writ of habeas corpus would issue, releasing Neil Morrison from all restraints and custody of the State of New Jersey in connection with the rape conviction of March 20, 1979. (Aa82). The order was based upon the district court's finding that respondent's counsel was ineffective and that respondent had been prejudiced by his failure to move to suppress evidence. (Pa31). Respondent's Fourth Amendment claim was ruled to be precluded from review by *Stone* v. *Powell*, 428 U.S. 465 (1976).

Petitioners filed a Notice of Appeal from the order dated January 30, 1984, to the Court of Appeals for the Third Circuit. On February 21, 1984, petitioners filed a

Notice of Motion for a stay of the order dated January 30, 1984, pending determination of the appeal, which was granted on March 20, 1984. (Aa84).

On January 18, 1985, the court of appeals rejected petitioners' contention that because respondent's Sixth Amendment claim was based on counsel's alleged failure to advance a Fourth Amendment claim, he was barred from federal collateral review by *Stone* v. *Powell,* 428 U.S. 465 (1976). *Morrison* v. *Kimmelman,* 752 F.2d 918, 922 (3d Cir. 1985). (Pa1). The court further found that the trial attorney's representation fell below an objective standard of reasonableness. *Morrison* v. *Kimmelman, supra.* However, the court of appeals remanded to the district court for a determination of whether there was a reasonable probability that the result would have been different absent counsel's error, under the standard formulated in *Strickland* v. *Washington,* —— U.S. ——, 104 S. Ct. 2052 (1984). The court noted that this new standard had been announced after the district court filed its opinion. *Morrison* v. *Kimmelman, supra,* at 923. The court further held, without explanation, that the State trial judge's factual determination at the bail motion hearing that his verdict was not affected by the alleged error is not a finding to which the presumption of correctness must be accorded under 28 U.S.C. sec. 2254(d). *Morrison* v. *Kimmelman, supra,* at 923 n.2.

On January 30, 1985, petitioners filed a petition for rehearing and rehearing *en banc* to the court of appeals on that portion of the court's ruling that the presumption of correctness, 28 U.S.C. sec. 2254(d), should not be accorded to the trial court's finding regarding the lack of prejudice to respondent from the alleged error, and requesting that the court state its reason for this ruling so that the determination could be reviewed. The court denied this petition on February 19, 1985. (Pa38).

On March 22, 1985, the court of appeals granted petitioners' motion to stay its certified judgment in lieu of mandate pending petitioners' filing the instant petition for *certiorari* with this Court. (Pa40).

Summary of Argument

1. *Stone* v. *Powell,* 428 U.S. 465 (1976), bars litigation of a Sixth Amendment claim which is based on counsel's failure to advance an available Fourth Amendment claim. Where litigation of the claim of ineffective assistance of counsel requires reaching the merits of a Fourth Amendment claim, permitting habeas relief based on the Sixth Amendment issue will permit such broad circumvention of the *Stone* doctrine as to endanger its future application. Where the alleged prejudice to a defendant is solely that seized evidence would have been excluded had counsel been effective, the values protected by the Sixth Amendment are not affected. Trustworthy evidence is excluded, however, contrary to the determination of this Court that such a result cannot be justified by the minimal deterrent effect on illegal searches from the invocation of the exclusionary rule on federal habeas corpus review.

2. A Fourth Amendment claim which is barred under *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), may not be asserted in a federal habeas corpus action in order to determine whether a Sixth Amendment violation has occurred. Litigation of the merits of the procedurally barred claim to provide a basis for a claim of ineffective assistance of counsel permits circumvention of the procedural bar.

3. The finding of a state court judge, sitting as a finder of fact at respondent's trial, that any error in the admission of challenged evidence would be harmless since it did

not form a major basis for his verdict was entitled to a presumption of correctness under 28 U.S.C. sec. 2254(d). The court of appeals' refusal to defer to this finding of fact without any stated reasons violates the mandate of this Court and of the Congress in enacting 28 U.S.C. sec. 2254(d). The trial judge, who sat as fact-finder in the bench trial, is in the best position to know the basis for his own verdict. The lack of deference to his finding in this regard severely undermines the comity concerns underlying 28 U.S.C. sec. 2254(d) and cannot be countenanced.

REASONS FOR GRANTING THE PETITION

POINT I

Stone v. _Powell_ and _Wainwright_ v. _Sykes_ should bar a claim of ineffective assistance of counsel where the alleged Sixth Amendment violation is counsel's failure to raise a Fourth Amendment claim.

The Court of Appeals for the Third Circuit ruled that absent a clear mandate from this Court, *Stone* v. *Powell,* 428 U.S. 465 (1976), should not be extended to bar consideration of a Sixth Amendment claim of ineffective assistance of counsel on federal habeas review even though that claim was based solely on counsel's failure to advance Fourth Amendment claims. *Morrison* v. *Kimmelman,* 752 F.2d 918, 920 (3d Cir. 1985).[2] (Pa5 to Pa6). This decision is in conflict with the decision of the Court of Appeals for the Second Circuit in *LiPuma* v. *Comm'r, Dept. of Corrections,* 560 F.2d 84 (2d Cir. 1977), *cert.* den. 434 U.S. 861 (1977), but is supported by the decision of the Fourth Circuit in *Sallie* v. *North Carolina,* 587 F. 2d 636, 648 (4th Cir. 1978), *cert.* den. 441 U.S. 911 (1978). Petitioners submit that where litigation of a Sixth Amendment claim involves

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[2] The court of appeals indicated that counsel's failure to conduct discovery was part of the basis for the ineffective assistance of counsel claim. (Pa3). The basis of respondents claim is not counsel's failure to obtain discovery, however. Respondent accused trial counsel of doing only one thing wrong: he failed to obtain the benefit of the Fourth Amendment exclusionary rule for respondent. The failure to have incriminatory evidence excluded from trial is the only prejudice which respondent claims to have incurred. The performance of counsel was otherwise not attacked and it has never been suggested that defense counsel's discovery practices affected the trial in any other way.

reaching the merits of a Fourth Amendment claim, the Sixth Amendment claim should be barred by *Stone* v. *Powell*. The *Stone* doctrine would otherwise be effectively circumvented in many cases.

Moreover, the failure to move to suppress evidence in a timely manner constitutes a state procedural default which independently bars litigation of the Fourth Amendment claim. *Wainwright* v. *Sykes*, 433 U.S. 72, 88 (1977). Where litigation of the merits of a procedurally barred claim is necessary to demonstrate the sole basis of prejudice from an alleged deprivation of the effective assistance of counsel, the Sixth Amendment claim must likewise be barred by the procedural default. Otherwise, the procedural bar may be easily avoided by raising an ineffective assistance of counsel claim.

A. *Stone* v. *Powell* bars respondent's claim of ineffective assistance of counsel.

The district court below ruled that respondent was denied effective assistance of counsel based upon trial counsel's neglect in failing to make a timely suppression motion, coupled with the likelihood of success of such a motion. The Third Circuit agreed that such a finding could support a claim of ineffective assistance of counsel. (Pa9). Petitioners urge that the finding at the heart of the district court's ruling, that a motion to suppress evidence below would have been successful, contravenes *Stone* v. *Powell*, 428 U.S. 465 (1976), which prohibits litigation of a Fourth Amendment claim in a federal habeas corpus action where the State has provided an opportunity for full and fair litigation of that claim.

It is clear, and respondent does not contest, that he was afforded a full and fair opportunity for litigation of

his claim of an unreasonable search and seizure in the State courts. He was procedurally barred from raising the claim by N. J. Court Rule 3:5-7(f), however, because of his failure to raise the claim in a timely manner prior to trial. The court of appeals, in recognition of the foregoing, ruled that the district court was precluded from considering respondent's Fourth Amendment claim under the *Stone* v. *Powell* doctrine. *Morrison* v. *Kimmelman*, *supra* at 919. The district court nonetheless circumvented *Stone* v. *Powell* in making a determination on the merits of the Fourth Amendment claim which was the basis, in turn, for the determination of the claim of ineffective assistance of counsel. The district court, in the absence of a hearing on the merits by any court, found that a motion to suppress would have probably succeeded, since there was no apparent justification in the trial record for the search. (Aa76-77). Thus, the district court reasoned, counsel's failure to so move constituted ineffective assistance of counsel.

Petitioners urge that this determination by the district court was in violation of *Stone* v. *Powell*. Indeed, granting habeas corpus relief based on ineffective assistance of counsel, when the substance of the alleged constitutional violation is actually a Fourth Amendment claim, is nothing more than a circumvention of the *Stone* doctrine. *LiPuma* v. *Comm'r, Dept. of Corrections, supra; Sallie* v. *North Carolina, supra* at 641-642 (Chapman, D.J., dissenting.) But see *Sallie* v. *North Carolina, supra* at 640. As the Second Circuit held in a case where petitioner complained of his counsel's failure to file a timely suppression motion:

> The fact that petitioner's claim is ostensibly grounded on the Sixth, rather than the Fourth, Amendment does not negate *Stone's* applicability

> because at the heart of this case lies an alleged Fourth Amendment violation. [*LiPuma* v. *Comm'r, Dept. of Corrections, supra,* 560 F.2d at 93].

In fact, as noted in the dissenting opinion in *Sallie* v. *North Carolina, supra,* allowing habeas corpus relief on the basis that counsel was ineffective by failing to raise (or effectively raise) a Fourth Amendment claim creates such a large exception to *Stone* v. *Powell* as to endanger its future application in habeas corpus cases. *Id.* at 648. The doctrine may be avoided by simply couching the petition in Sixth, rather than Fourth, Amendment terms. See, *e.g., Maxwell* v. *Mabry,* 672 F.2d 683, 686 n.11 (8th Cir. 1982) (In order to avoid the *Stone* v. *Powell* bar, petitioner requested "leave to amend his pleading to fashion his Fourth Amendment claim in the form of an ineffective assistance of counsel challenge.")

In holding that the Sixth Amendment claim should be allowed, the opinion of the court of appeals by the Honorable Joseph S. Lord, III, relied on the fact that the Sixth Amendment and Fourth Amendment protect different interests. The Sixth Amendment safeguards the trial and integrity of the fact-finding process. The Fourth Amendment's exclusionary rule remedy was created to deter police from illegal searches, and its application frequently adversely affects the truth finding process by excluding relevant, trustworthy evidence. See, *Stone* v. *Powell, supra,* at 491-492. Petitioners fully agree with the Third Circuit's conclusion that the interests protected by the Sixth Amendment right to effective assistance of counsel are far different from those which may be enhanced by the Fourth Amendment exclusionary rule. In fact, petitioners agree that in some instances such an analysis might be dispositive. However, where defense counsel is charged with only one trial error—the failure to make effective use of the

exclusionary rule—the situation is much different. In this situation the court should consider the ultimate goal which would have been achieved had counsel acted differently. That goal would have been the exclusion of reliable, probative evidence of respondent's guilt. This evidence would not have been excluded due to unreliability nor to vindicate violation of a personal constitutional right nor to redress an injury to the respondent. *Stone* v. *Powell, supra* at 486. Rather the evidence would have been excluded solely as a deterrent to future Fourth Amendment violations by law enforcement officers. Therefore, counsel's only possible failures in this case were his failure to enhance the overall deterrent effect of the exclusionary rule and his failure to obtain for his client a windfall benefit of the exclusionary rule. As such, it is clear that in the final analysis, precisely the same values are present in this case as were present in *Stone* v. *Powell,* that is, whether the incremental benefits of allowing habeas corpus relief which is ultimately grounded on a Fourth Amendment claim are outweighed by the detrimental effect which use of the exclusionary rule has on the truth-finding process. *Id.* at 488-493.

Petitioners therefore suggest that in a situation in which the sole basis for an ineffective assistance of counsel claim is the contention that the Fourth Amendment exclusionary rule was not invoked, the rationale underlying *Stone* v. *Powell* is totally applicable. There is no real distinction between couching such a contention in Sixth Amendment terms and raising it under the Fourth Amendment. Moreover, the fact that the possible error was caused by a lawyer in a state court rather than a state court judge in no way alters the effect of that error or the purposes to be advanced by the exclusionary rule. Thus, the weighing process in this situation should be precisely the same in this case as in the pure *Stone* v. *Powell* situation and the ruling of *Stone* v. *Powell* should be applied to the present case.

B. The ineffective assistance of counsel claim is barred by respondent's procedural default.

The concern for comity, expressed in *Stone* v. *Powell* through deference to state courts by federal courts on Fourth Amendment issues, is further aggravated in a case, such as the instant case, where the failure to raise the Sixth Amendment claim constitutes a state procedural default, which in itself bars litigation of the Fourth Amendment claim. The district court's improper determination of the merits of the seizure issue served to award respondent a windfall benefit and ignored his failure to follow proper state procedural rules.

Respondent's failure to file a timely motion to suppress evidence seized from his apartment barred him from raising that issue on the merits in state courts. N. J. Court Rule 3:5-7(f). The procedural default doctrine, barring federal habeas corpus review of a matter due to a default of a reasonable state procedural rule, should have thus barred his claim in the federal court. *Wainwright* v. *Sykes*, 433 U.S. 72, 88 (1977).[3] Principles of federalism and comity

[3] Petitioners note that in *Evitts* v. *Lucey*, —— U.S. ——, 105 S.Ct. 830 (1985), this Court noted that state courts should attempt to enforce procedural rules by penalizing the errant attorney rather than the defendant. 105 S.Ct. at 837-838. This rule applied to post-trial procedural rules which clearly are of less urgency than rules relating to procedures before and during trial. The latter enable trials to be conducted efficiently by ensuring that motions are made at such a time that proper rulings may be made, and evidence excluded without undue interference with the orderly proceses of trial. See *Henry* v. *Mississippi*, 379 U.S. 443, 448-449 (1965). The Court in *Lucey* did not in any way indicate that the normal procedural default rules enunciated in cases such as *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, *supra*, and *Davis* v. *United States*, 411 U.S. 233 (1973) be abandoned.

(Footnote continued on following page)

indicate that reasonable state rules are entitled to respect in federal courts. *Wainwright* v. *Sykes*, *supra*. The rule barring untimely motions to suppress evidence seized in allegedly illegal searches serves important state interests, just as did the contemporaneous objection rule upheld as a reasonable procedural rule in *Wainwright*, *supra*. See also, *United States ex rel. Caruso* v. *Zelinsky*, 687 F.2d 435, 438 (3d Cir. 1982). The district court's action in considering this default as a basis for an ineffective assistance of counsel claim gave respondent an undeserved benefit of having his search and seizure claim resolved in federal court, when he was properly barred from relief on this ground due to his procedural default, as well as by the *Stone* v. *Powell* doctrine.

It is asserted that the doctrine enunciated in *Stone* v. *Powell* precluded the grant of a writ of habeas corpus in this case. If this Court does not agree with this assertion, however, it cannot be gainsaid that *Wainwright* v. *Sykes* ordinarily precludes federal habeas corpus relief based on a claim which was not decided by the state courts due to a procedural default by the habeas corpus petitioner. The only exception to this general rule is the situation in which the petitioner demonstrates good cause for the default and actual prejudice resulting therefrom. *Engle* v. *Isaac*, 456 U.S. 187, 192 (1982). Clearly, respond-

(Footnote continued from preceding page)

It is noted, however, that there is an apparent conflict between the broad statement in *Lucey* that a criminal defendant should not be penalized for his counsel's failure to abide by state procedural rules and the long-held principle that noncompliance with state procedural rules, such as the contemporaneous objection rule, will bar federal habeas corpus relief. See, *Wainwright* v. *Sykes*, *supra*; *Francis* v. *Henderson*, 425 U.S. 536 (1976).

ent cannot demonstrate actual prejudice in this case. This is true for two reasons. First, it is clear that respondent cannot seriously claim that he has been convicted of a crime which he did not commit; therefore, he does not suffer from a fundamentally unjust incarceration. See *United States* v. *Frady*, 456 U.S. 152, 170-172 (1982). Second, as demonstrated in Point II, *infra*, the trial judge, who sat as fact finder in respondent's trial, found that the challenged evidence played only a small part in his decision and, thus, was not prejudicial. *United States* v. *Hasting*, 461 U.S. 499, ——, 103 S.Ct. 1974, 1980 (1983).

Based on the foregoing, it is abundantly clear that respondent could not have met the cause and prejudice test enunciated in *Davis* v. *United States*, 411 U.S. 273 (1973) and clarified in *Wainwright* v. *Sykes*, *supra*. Thus, he was foreclosed from federal habeas corpus relief on the basis of his state procedural default. Moreover, it is asserted that *Stone* v. *Powell* independently precluded relief in this case. The courts below have joined these two independent bars to federal habeas corpus relief in such a way that neither bar performs its intended function.

This innovative approach not only thwarts the rules announced by this Court, but also places state trial judges in an intolerable position. They may ignore the state rules and laws which they have sworn to abide and hear the motion despite the procedural default, thus foreclosing habeas corpus review by virtue of *Stone* v. *Powell*, *supra*. Alternatively, they may follow state rules, as they are required to do, and risk having proceeded through an entire trial fruitlessly since a federal court may subsequently grant a writ of habeas corpus. Such results are devastating to the interests of the community and could not have been envisioned by this Court.

This case presents an important federal issue which has not been, but should be, decided by this Court, lest the *Stone* v. *Powell* doctrine and *Wainwright* v. *Sykes* rule be undermined. In addition, the decision of the Third Circuit Court of Appeals is in conflict with a decision of another circuit court. Therefore, this Court should grant *certiorari* pursuant to Supreme Court Rule 17(a) and (c).

POINT II

The Court of Appeals erroneously indicated, without explanation, that deference is not due to a state court factual finding.

The Third Circuit Court of Appeals ruled that the trial judge's factual determination that the introduction of the evidence in question could not have amounted to prejudicial error since it was much less important than the issue of witness credibility in this particular case was not to be accorded the presumption of correctness under 28 U.S.C. sec. 2254(d). The Third Circuit issued this ruling even though the respondent was convicted following a bench trial at which the trial judge was the finder of fact. *Morrison* v. *Kimmelman*, 752 F.2d 918, 923 n.2 (3d Cir. 1985). (Pa11). The circuit court reached this holding without any explanation, despite the fact that it was dispositive of the crucial issue raised by petitioners that the district court erred in failing to defer to this state court factual finding. Petitioners requested a rehearing, asking the court of appeals to specify which of the eight exceptions contained in section 2254(d) it relied upon in determining that the presumption did not apply, as required by this Court in *Sumner* v. *Mata*, 449 U.S. 539, 551 (1981) (*Sumner* v. *Mata I*), on reh. 455 U.S. 591 (1982) (*Sumner* v. *Mata II*). The rehearing was denied and still no explanation was provided. (Pa38).

Petitioners submit that the failure of the court of appeals to explain the reasons underlying its determination is demonstrative of the fact that it was disregarding the mandate of this Court, enunciated in *Sumner* v. *Mata I*, that the factual findings underlying a legal determination must be accorded deference. Succinctly stated, under the facts of this case the court of appeals could not have explained its ruling in any manner consonant with this Court's rulings and the specific language of section 2254(d). Since the court of appeals has decided this federal question in a way that conflicts with the applicable decisions of this Court, petitioners submit that review should be granted.

The state trial judge was the fact finder at respondent's bench trial. When respondent subsequently moved for bail pending appeal, the trial court was required by state law to determine whether any substantial issue existed for appellate review. (New Jersey Court Rule 2:9-4). Pursuant to this requirement the court ruled that respondent's claim that evidence had been obtained during an illegal search was not a substantial issue for appellate review which would be likely to cause a reversal since, at most, introduction of this evidence was harmless error under the facts of this case. Thus, the judge made a fact finding that "the most important phases of the case were direct testimony from the victim herself as well as from testimony of the witnesses [and] medical examinations . . . . The sheet was just one small phase in this whole case." (Aa33). The state judge thereby determined that, absent the challenged evidence, the result in the case would not have been different.

The state trial court thus made a factual determination after a hearing on the merits as to the effect of the evidence in question on the verdict. Of course, the judge who made this fact-finding was in a better position than any

other living person to make a judgment as to the effect of the challenged evidence on the verdict in this case, since he was the fact finder at trial and he issued the verdict in question. This state court factual determination is clearly entitled to a presumption of correctness under 28 U.S.C. sec 2254(d).

In *Sumner* v. *Mata I, supra,* this Court emphasized the importance of subsection (d).

> A writ issued at the behest of a petitioner under 28 U.S.C. Sec. 2254 is in effect overturning either the factual or legal conclusions reached by the state court system under the judgment of which the petitioner stands convicted, and friction is a likely result. . . . [I]t is clear that in adopting the 1966 amendments, Congress in sec. 2254(d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in sec. 2254(d) was found to exist by the federal habeas court . . . or unless the *habeas* court concludes that the . . . state court determination is not "fairly supported by the record" . . . . [449 U.S. at 550].

Despite this extremely strong *caveat* from the Supreme Court, the district court in the present case totally ignored the state court finding. On appeal from the district court's failure to defer to the state court finding, the court of appeals simply stated, without further explanation, that the state court's finding "is not a finding to which the presumption of correctness must be accorded under 28 U.S.C. 2254(d)," *Morrison* v. *Kimmelman, supra* at 923 n.2, (Pa11), and refused to cite an exception justifying this ruling when requested to do so in a petition for rehearing.

Petitioners submit the appellate court has thus attempted to preclude an appeal from its ruling. That ruling ignored the mandate of this Court in *Sumner* v. *Mata I* that deference must be paid to a state court finding regarding the factual aspect of a legal determination. This blatant departure from a decision of this Court cannot be countenanced.

Various unmeritorious reasons have been advanced as to why the presumption might not apply. Petitioners will address these issues and dispose of them briefly. First, the court below referred to this factual determination as a remark (752 F.2d at 923 n.2), thus suggesting that the determination was not an actual "finding," but was rather an unconsidered comment regarding the evidence. This is clearly incorrect. The trial court was required by state law, New Jersey Court Rule 2:9-4, to determine whether there was a substantial issue for appellate review in ruling on respondent's motion for bail pending appeal. The trial court determined that the alleged error was not a substantial issue for appeal because the evidence in question was just one small phase of the trial. Thus, the court made a specific factual finding, after a hearing on this issue in which both parties were present, that its verdict was independent of the challenged evidence. This was a specific factual finding required to be made at a hearing and was thus clearly entitled to the presumption of correctness.

Second, the district court suggested it would not defer to the state court finding because it believed the trial court was biased and did not make accurate findings. The district court stated:

> I know what a trial judge is worried about. They're worried about Courts of Appeals. It isn't hard to fathom that the trial judge certainly knew that the one hairy thing in the case was the evidence . . . that the police just . . . took away without a warrant. And him saying on the record that didn't play a role in his decision . . . I don't know that that is worth much. . . . [Aa50].

This utter lack of deference for the state court's findings undermined the principles of comity and ignored the means which the Congress has chosen to resolve a great source of conflict in our federal system. Surely, the state trial judge who sat as a fact-finder is in the best position to know the basis for his own verdict. The state court must be given due respect, and it must be presumed that the court gave an honest appraisal of the evidence before it. When a trial court, sitting as fact finder, indicates that its decision was predicated upon admissible evidence, it will rebut any allegation that the court relied upon incompetent evidence. *State* v. *Antone,* 62 Haw. 346, —, 615 P.2d 101, 107 (1980).

It cannot be said that this finding was, in any event, not fairly supported by the record. 28 U.S.C. sec. 2254 (d)(8). There was overwhelming evidence of respondent's guilt. The physical evidence gained from searching the apartment added practically nothing to the determination that respondent had raped Marjorie Jones. The presence of seminal stains on respondent's own bedsheet are of little probative value with regard to the issue of whether respondent raped Majorie Jones. In fact, respondent testified that he had engaged in sexual intercourse on the sheet with another woman prior to the date of the instant offense. (5T135-22 to 25). The presence of respondent's head hairs on his own bed certainly are of no consequence to the criminal charges. Likewise, the fact that hairs similar to the head hairs of Majorie Jones were present on the bedsheet is not probative of respondent's guilt. It was never disputed that the victim was in respondent's one room apartment on the night of the offense. Indeed,

before defense counsel knew that the State intended to introduce evidence from the bedsheet at trial, he admitted in his opening statement that the victim was in respondent's apartment on the night of the rape. (Sa3).

Furthermore, far more damaging physical evidence was admitted into evidence and was not challenged by respondent: semen matching his blood type was found on the victim's underpants. Thus, the trial court's finding regarding the slight significance of the evidence gained from the search of respondent's apartment was fairly supported by the record. 28 U.S.C. sec. 2254(d)(8).

Finally, respondent has contended that the finding is a mixed question of law and fact, and is therefore not entitled to the presumption of correctness. This contention is incorrect. This Court has noted that "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland* v. *Washington,* —— U.S. ——, 104 S.Ct. 2052, 2070 (1984). However, this Court has recently clarified that the *factual aspects* of mixed questions of law and fact are subject to the presumption of correctness.

This Court has applied the presumption to various factual determinations where a federal question of law was implicated. This Court deferred to the state court's determination of the impartiality of a juror in *Patton* v. *Yount,* —— U.S. ——, 104 S.Ct. 2885 (1984). The Court explained:

> . . . the constitutional standard that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law . . . whether a juror can in fact do that is a determination to which habeas courts owe special deference. . . . [Id. at 2892 n.12].

This deference to the factual aspect of a mixed question of law and fact has been manifest in many other Supreme Court cases. In *Sumner* v. *Mata II, supra,* this Court held that the presumption of correctness was to apply to factual inferences bearing upon the mixed question of whether an identification was suggestive. In *Rushen* v. *Spain,* —— U.S. ——, 104 S.Ct. 453 (1983), this Court found the presumption applicable to whether jury deliberations were biased. In *Maggio* v. *Fulford,* —— U.S. ——, 103 S.Ct. 2261 (1983), the presumption was applied to a defendant's competency to stand trial. In *Marshall* v. *Lonberger,* 459 U.S. 422 (1983), this Court found the presumption applicable to the factual determination of whether the defendant understood the criminal charges to which he pled guilty, which finding was crucial to the mixed question of whether the plea was voluntary. Most recently, in *Wainwright* v. *Witt,* —— U.S. ——, 105 S.Ct. 844 (1985), the Court applied the statutory presumption of correctness to the factual aspect of a mixed question of whether a juror should be disqualified from a capital trial. Whether a juror was actually biased against capital punishment was accorded deference on habeas review.

When a violation of a constitutional right is alleged, there will ordinarily be a "mixed question" of law and fact. This cannot bar application of the presumption of correctness to the factual aspects of the determination. If the presumption is not applicable to the factual findings underlying these "mixed question" determinations, it would not apply to many significant factual findings which are reviewable on federal habeas corpus. The crucial policy considerations underlying sec. 2254(d) noted by this Court in *Sumner* v. *Mata I, supra,* will be wholly frustrated if deference is not afforded to a state court's factual findings every time a mixed question is reviewed. Such a result has not been countenanced by this Court.

Clearly, in the instant case, the trial court's finding that the challenged evidence did not affect the result of the trial was a factual finding. That the finding may be dispositive of the prejudice issue, which is a mixed question of law and fact, does not bar application of the presumption to the factual aspect of the determination. *Patton* v. *Yount, supra; Sumner* v. *Mata II, supra; Wainwright* v. *Witt, supra.*

It is difficult to imagine a situation in which deference is more appropriate than that in which the judge's fact finding is based purely on a knowledge and evaluation of his own mental processes. For a federal court to rule that a state judge has not correctly evaluated his own thoughts and does not know the reasons underlying his own verdict is certainly not in keeping with the intent of section 2254(d). Such a ruling should not be allowed to stand. Moreover, the court of appeals' opinion is in direct contravention of the precedent established by this Court in *Sumner* v. *Mata, I, supra.* Therefore, this Court should grant *certiorari* pursuant to Supreme Court Rule 17(c).

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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On the Petition

Dated: April 18, 1985

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit, Decided January 18, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5138

NEIL MORRISON,

Appellee

v.

IRWIN I. KIMMELMAN, Attorney General of New Jersey and JOHN J. RAFFERTY, Superintendent, Rahway State Prison,

Appellants

On Appeal from the United States
District Court for the
District of New Jersey
(D.C. Civ. No. 83-1428)

Argued: October 30, 1984
Before: GARTH and SLOVITER, Circuit Judges
and LORD, District Judge*
(Filed January 18, 1985)

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* Hon. Joseph S. Lord, III, Chief Judge Emeritus, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

LORD, *District Judge*, sitting by designation.

I.

Introduction

This appeal from an order of the district court granting petitioner's habeas corpus petition presents three issues. First, does the rule of *Stone v. Powell*, 428 U.S. 465 (1976), barring collateral review of a Fourth Amendment claim preclude our consideration of petitioner's Sixth Amendment claim that he was denied effective assistance of counsel? Second, if we may review petitioner's claim, did his "counsel's representation fall below an objective standard of reasonableness", *Strickland v. Washington*, 104 S.Ct. 2052, 2065 (1984)? Third, if so, did the ineffectiveness prejudice defendant under the standard set forth in *Strickland v. Washington*, *supra*, 104 S.Ct. at 2068?

II.

Facts

In March, 1979, petitioner was convicted in a bench trial in a New Jersey state court of carnal abuse, forcible rape, impairing the morals of a child, and

Appendix A

private lewdness in connection with his alleged rape of his fifteen year old employe. During the course of petitioner's trial, the state offered into evidence a sheet which Detective Delores Most testified she had seized from petitioner's bed shortly after the rape allegedly occurred in petitioner's apartment. The search and seizure were non-consensual and warrantless. Police lab technicians later testified that stains on the bed sheet were positive for sperm from a man with petitioner's blood type and that hairs recovered from the sheet were similar to the head hair of both the petitioner and the victim.

Because defense counsel failed to conduct any discovery, he was unaware that the state was in possession of the sheet. He therefore failed to make a timely motion to suppress the evidence before the trial, as required by New Jersey Court Rule 3:5-7(a). When defense counsel moved to suppress during Detective Most's testimony, the trial judge stated that under the state court rules he would no longer entertain the motion. The trial judge also noted that there would have been "a very valid basis for suppression" if the motion had been made in a timely manner. In addition, he reprimanded defense counsel for failing to conduct discovery which would have alerted him to the fact that the state was in possession of petitioner's sheet.

Following his conviction, petitioner unsuccessfully exhausted state remedies. *See Morrison v. Kimmelman*, 579 F. Supp. 796, 800 (D.N.J. 1984). This petition for habeas corpus followed. The district judge properly determined that he was precluded from reviewing petitioner's Fourth Amendment claim under the doctrine of *Stone v. Powell*, *supra*. *Morrison v. Kimmelman*, *supra*, at 802. However, the district court did consider petitioner's Sixth Amendment claim and found that "based on the unmitigated negligence of petitioner's trial counsel in failing to conduct any

discovery, combined with the likelihood of success of a suppression motion had it been timely made," petitioner was deprived of effective assistance of counsel. *Id.* at 802-03. The court also determined that this deprivation constituted error that was not harmless beyond a reasonable doubt. *Id.* at 804. The district court ordered that the writ would issue unless the state retried Morrison within 90 (ninety) days. This order, however, was stayed by the district court pending determination of this appeal.

III.

Discussion

A.

The district judge was undoubtedly correct in deciding that *Stone v. Powell* precludes federal court review of petitioner's Fourth Amendment exclusionary claim. That case held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." 428 U.S. at 494. Petitioner in this case does not argue that New Jersey denied him a full and fair opportunity to litigate his claim. Rather, he argues that his counsel's ineffectiveness prevented him from taking advantage of the opportunity provided under New Jersey's court rules. Since the state did provide an opportunity for full litigation of the Fourth Amendment claim, under *Stone* the district court and this court are now precluded from reviewing the legality of the search under the Fourth Amendment. We must decide here whether that bar also extends to petitioner's Sixth Amendment claim because our consideration of it must touch on the merits of petitioner's Fourth Amendment claim.

Other courts have wrestled with this troublesome issue. In *LiPuma v. Commissioner*, 560 F.2d 84 (2d Cir. 1977), *cert. denied*, 434 U.S. 861 (1978), the Second Circuit held that counsel's failure to file a suppression motion before trial did not constitute ineffective assistance of counsel. *Id.* at 93. In dictum the court stated: "The fact that petitioner's claim is ostensibly grounded on the Sixth, rather than the Fourth, Amendment does not negate *Stone's* applicability, because at the heart of the case lies an alleged Fourth Amendment violation." *Id.* at 93 n.6. The Fourth Circuit reached the opposite conclusion in *Sallie v. State of North Carolina*, 587 F.2d 636 (4th Cir. 1978), *cert. denied*, 441 U.S. 911 (1979), in which it ruled ". . . we do not read [*Stone*] to say that issuance of a writ of habeas corpus on sixth amendment grounds is barred if a defense attorney fails to object to the admission of evidence obtained in clear violation of the fourth amendment." *Id.* at 640.

The court in *Tolliver v. Wyrick*, 469 F. Supp. 583 (W.D. Mo. 1979) stated that if it had been called upon to decide whether to extend *Stone* to a Sixth Amendment violation, it would have refused to do so. *Id.* at 604 n.32. The court determined that *Stone* did not apply to a violation of the *Miranda* rules. *Id.* at 604. And in *Moran v. Morris*, 478 F. Supp. 145 (C.D. Ca. 1979), vacated on other grounds, 665 F.2d 900 (9th Cir. 1981), the court was careful to differentiate between the rationale for granting relief under the exclusionary rule for a Fourth Amendment claim and the purpose of granting relief for a Sixth Amendment violation when counsel failed to raise a Fourth Amendment claim. The court concluded that *Stone* should not be extended to include Sixth Amendment claims. *Id.* at 151-52.

We are persuaded that absent a clear mandate from the Supreme Court, *Stone v. Powell* should not be extended to bar consideration of Sixth Amendment

issues based on counsel's alleged failure to advance Fourth Amendment claims. We rely on the language of *Stone* itself and on our analysis of the differences between Fourth and Sixth Amendment claims.

In the majority opinion in *Stone*, Justice Powell painstakingly examined the history and purpose of the exclusionary rule. He noted, for example, that "although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Id.* at 491. He then explained that the Court's decision in *Stone* springs from the pragmatic conclusion that on federal habeas corpus review, "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force." *Id.* at 494-95. Most significantly for our purposes here, in response to the dissent's alarmed characterization of the decision as the prelude to a "drastic withdrawal of federal habeas jurisdiction," *id.* at 517, Justice Powell emphasized the limited nature of the decision:

> Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . . In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a

> claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation.

Id. at 494 n. 37. Certainly, this language cannot be read as a license to expand freely the decision of the Court to include other types of constitutional claims.

The Sixth Amendment, which appellants would have us include under the bar of *Stone*, implicates an entirely different set of concerns than does the exclusionary rule. As Justice Powell notes, the exclusionary rule, although it arises out of a constitutional right, is merely a judicially created doctrine. The Sixth Amendment, however, is an essential component of our constitutional system. The exclusionary rule was created to deter police officers from engaging in illegal searches and seizures. Its application frequently affected the truth finding process adversely by excluding relevant, trustworthy and probative evidence. The rule had no bearing on the integrity of the trial. The Sixth Amendment, on the other hand, was adopted to safeguard the trial and the integrity of the fact-finding process and the fundamental rights of defendants. If we err in construing *Stone* too narrowly, we will be burdening the federal courts with the duty of deciding issues in petitions for habeas corpus which the Supreme Court has concluded could be satisfactorily left to the state courts. But if we err in construing *Stone* too broadly, we will do more than inconvenience criminal defendants. We will in fact impinge upon one of their most basic constitutional rights. Indeed, we would be curtailing -- without Supreme Court authority -- a right which the Court itself has continued to expand. *Cf. Betts v. Brady*, 316 U.S. 455 (1942) (counsel guaranteed only in capital cases) with *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigents to

appointed counsel in all felony cases); *Brewer v. Williams*, 430 U.S. 387 (1977) (right to counsel at or after the initiation of adversarial proceedings); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to appointed counsel in misdemeanor prosecutions when jail sentences are imposed); *Douglas v. California*, 372 U.S. 353 (1963) (right to appointed counsel on appeal).

The exclusionary rule is simply a judicially created chastisement to deter police misconduct. The right to effective assistance of counsel, however, is firmly embedded in the Constitution to protect defendants, assure a fair trial, and further the search for truth. *Stone* is the culmination of years of justified questioning of and speculation about the efficacy, -- not of the Fourth Amendment, -- but of the exclusionary rule. On the other hand, there has never been any doubt of the absolute necessity of effective counsel.

> The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, *supra*, 104 S.Ct. at 2063.

We are convinced that an extension of *Stone* to the case before us would be unwarranted in light of the Court's own refusal to broaden *Stone's* effect without careful consideration. In *Brewer v. Williams*, *supra*, the Court refused to consider whether the rationale of *Stone* should be extended to certain Fifth and Sixth Amendment claims even though the question had been raised during the oral argument of that case. Justice Powell noted in his concurring opinion:

> That question has not been presented in the briefs or arguments submitted to us, and we therefore have no occasion to consider the possible applicability of *Stone* . . . [That] is a question as to which I intimate no view, and which should be resolved only after the implications of such a ruling have been fully explored.

Id. at 414. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court noted but did not consider the possible application of *Stone* to an alleged *Miranda* violation when there had been a full and fair opportunity to raise the argument in state proceedings. *Id.* at 87 n.11. Instead, the Court chose to resolve *Wainwright* on other grounds. *Id.*

B.

We hold that *Stone v. Powell* does not bar federal examination of petitioner's Sixth Amendment claim. Our inquiry, then, must ask whether: (1) "counsel's representation fell below an objective standard of reasonableness", *Strickland v. Washington*, 104 S.Ct. at 2065;[1] and (2) whether, "but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 2068. The district judge concluded that counsel was grossly ineffective. We have no difficulty in reaching this same conclusion.

The second inquiry must be a two step process. First, whether, if counsel had conformed to proper norms of advocacy and had timely moved to suppress, the state court would have granted or denied the motion, a determination which we would be foreclosed from examining. This step is necessary because obviously if the state courts would have denied the

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1. This criterion as stated by the Supreme Court is substantially that of this Circuit as expressed in *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970), and applied by the district judge.

motion, counsel's inadequacy would have been immaterial and could not have affected the outcome of the case. Here again, the conclusion is not difficult to reach. The state trial judge, who would have heard the motion, stated that there was "a very valid basis for suppression" and the district judge concluded that there was a "likelihood of success of a suppression motion." We cannot disagree.

The second step of the inquiry mandated by *Strickland v. Washington*, requires us to address the issue whether, if the bed sheet had not been in evidence, there is a reasonable probability that the result would have been different. 104 S.Ct. at 2068.

Because the district court filed its opinion in this case before the Supreme Court decided *Strickland*, it relied on the standard for determining prejudice because of ineffective assitance of counsel enunciated in *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970), followed in *U.S. v. Baynes*, 687 F.2d 659 (3d Cir. 1982). In *Baynes*, we held that petitioner need only demonstrate that the prejudice he suffered as a result of his counsel's ineffective assistance was not harmless beyond a reasonable doubt. We explained that standard by stating that "when a conviction is tainted by ineffective assistance . . . a court should expect the habeas petitioner to demonstrate that there is a 'reasonable possibility' that had the error of which he complains not occurred, the jury might have arrived at a different outcome." *Id.* at 670-71. Because the district judge decided that petitioner satisfied his burden under this standard, he granted the writ. *Morrison v. Kimmelman, supra*, 579 F. Supp. at 804. Thus, the standard applied by the district judge, while correct at the time, is no longer valid.

The issue of whether the representation a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. *Strickland v. Washington*, 104 S.Ct. at 2070. We are

therefore not bound by the clearly erroneous rule and we may freely review the district court's conclusion. *United States ex rel. Johnson v. Johnson*, 531 F.2d 169, 174 n.12 (3d Cir.), *cert. denied*, 425 U.S. 997 (1976). We may, however, also remand to the district court for a determination of this issue. We hold that remand is the proper procedure in this case. Judge Stern's analysis of this case is in error only because the Supreme Court announced a new standard after he filed his opinion. Because of this intervening circumstance, it is appropriate to allow the district judge an opportunity to review petitioner's Sixth Amendment claim under the new standard announced in *Strickland*.[2]

The judgment of the district court will be vacated, and the case remanded for further proceedings consistent with this opinion.

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2. The State of New Jersey has argued that introduction of the laboratory analysis of the bedsheet was not prejudicial to the petitioner because the evidence of seminal stains was consistent with his testimony that he had engaged in sexual intercourse on the sheet with another woman prior to the date of the alleged rape, and the evidence of head hairs similar to the victim's is consistent with her conceded presence in petitioner's apartment. The State stresses that the state court judge remarked at the bail motion hearing that "the sheet was just one small phase in this whole case." Aa33. This statement is not a finding to which a presumption of correctness must be accorded under 28 U.S.C. § 2254(d). Because we are remanding the issue to the district court for determination, we express no opinion on the State's argument as to the prejudice *vel non* of the evidence relating to the bedsheet.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division, Dated March 18, 1981

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4157-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NEIL MORRISON,

Defendant-Appellant.

Submitted March 9, 1981—Decided Mar 18, 1981.

Before Judges Seidman and Antell.

On appeal from Superior Court, Law Division, Passaic County.

Stanley C. Van Ness, Public Defender of New Jersey, attorney for appellant (John P. Gleason, designated counsel, on the brief).

John J. Degnan, Attorney General of New Jersey, attorney for respondent (Roger S. Mitchell, Deputy Attorney General, of counsel and on the brief).

Appendix B

PER CURIAM.

After a trial by a judge sitting without a jury defendant was convicted of carnal abuse of a 15 year old girl, impairing the morals of a minor, N.J.S.A. 2A:96-3, and lewdness, N.J.S.A. 2A:115-1. He was sentenced to a term of eight to ten years in the New Jersey State Prison for rape and received lesser sentences for the other convictions to run concurrently with the sentence for rape.

On this appeal he argues that he was denied the effective assistance of counsel in that his attorney was unprepared for trial and failed to move for suppression of certain evidence, error by the trial judge in refusing to conduct a suppression hearing during the trial, and error by the trial judge in refusing to merge the charges of carnal abuse, impairing the morals of a minor, and lewdness with the charge of rape.

We have examined defendant's specific allegations of ineffective assistance and conclude that the claimed deficiencies do not constitute ineffectiveness sufficient to merit reversal. Defendant has not carried his burden of demonstrating that his attorney's inadequacy was of "such magnitude as to thwart the fundamental guaranty of a fair trial." *State* v. *Edge,* 57 N.J. 580, 593 (1971).

His complaint that the trial judge erred in refusing his request for a suppression hearing during the trial is clearly without merit. R. 2:11-3(e)(2).

Since all of the criminal charges arose from a single criminal episode involving the same 15 year old girl it is clear that the convictions of carnal abuse, impairing the

Appendix B

morals of a minor, and lewdness merge into the conviction for rape. *State* v. *McCauley*, 157 N.J. Super. 349, 355 (App. Div. 1978), certif. den. 77 N.J. 500 (1978). The judgments of conviction for the foregoing lesser offenses and the sentences imposed thereon are accordingly vacated.

Affirmed as modified.

APPENDIX C

Order of the New Jersey Supreme Court
Dated May 18, 1981

SUPREME COURT OF NEW JERSEY

C-4452 SEPTEMBER TERM 1980

(Filed: May 20, 1981)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

NEIL MORRISON,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4157-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 18th day of May, 1981.

STEPHEN W. TOWNSEND
Clerk

APPENDIX D

Order of the United States District Court for the District of New Jersey, Dated January 30, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 83-1428

NEIL MORRISON,

Petitioner,

v.

IRWIN I. KIMMELMAN, Attorney General of New Jersey and JOHN J. RAFFERTY, Superintendent, Rahway State Prison,

Respondents.

In accordance with the opinion of the Court filed herewith,

It is on this 30 day of January, 1984,

ORDERED that a writ of habeas corpus issue for Neil Morrison, releasing him from all restraints and custody of the State of New Jersey, including but not limited to fines and parole requirements, unless the State of New Jersey begins proceedings for retrial within ninety (90) days hereof.

HERBERT J. STERN
United States District Judge

APPENDIX E

Amended Order of the United States District Court for the District of New Jersey, Dated February 2, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 83-1428

NEIL MORRISON,

Petitioner,

v.

IRWIN I. KIMMELMAN, Attorney General of New Jersey and JOHN J. RAFFERTY, Superintendent, Rahway State Prison,

Respondents.

It is on this 2 day of February, 1984,

ORDERED that the order of this court dated January 30, 1984 be, and it hereby is, amended to read as follows:

ORDERED that a writ of habeas corpus issue for Neil Morrison, releasing him from all restraints and custody of the State of New Jersey in connection with the rape conviction of March 20, 1979, including but not limited to fines and parole requirements, unless the State of New Jersey begins proceedings for retrial within ninety (90) days hereof.

HERBERT J. STERN
United States District Judge

APPENDIX F

Opinion of the United States District Court for the District of New Jersey, Dated January 30, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 83-1428

NEIL MORRISON,

Petitioner,

v.

IRWIN I. KIMMELMAN, Attorney General of New Jersey and JOHN J. RAFFERTY, Superintendent, Rahway State Prison,

Respondents.

APPEARANCES:

Sweeney, Bozonelis, Staehle and Woodward
By: William E. Staehle, Esquire
186 Main Street
P.O. Box 67
Chatham, New Jersey 07928
(Attorneys for Petitioner)

Appendix F

Irwin I. Kimmelman, Attorney General of New Jersey
By: Arlene R. Weiss
Deputy Attorney General
Division of Criminal Justice
Appellate Section
CN 086
Trenton, New Jersey 08625
(Attorney for Respondents)

In this petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, petitioner Neil Morrison challenges the constitutionality of his confinement at New Jersey State Prison at Rahway on three grounds.[1] First, petitioner contends that the warrantless search of his apartment and seizure of certain evidence submitted at trial by the prosecution violated his fourth and fourteenth amendment rights. Second, petitioner maintains that his attorney's failure to make a timely demand for discovery and a timely suppression motion at trial deprived petitioner of his right to effective assistance of counsel. Third, petitioner argues that the legal standard for ineffective assistance of counsel relied on by the New Jersey State courts in disposing of his appeal is unconstitutional. Respondents move to dismiss the petition on the ground that petitioner has failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b). For the reasons that follow, we will deny respondents motion to dismiss and grant the writ of habeas corpus.

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[1] At the time the petition was filed, petitioner was unrepresented by counsel. By the Court's Order of October 4, 1983, an attorney was appointed pursuant to 18 U.S.C. § 3006A(g) to represent petitioner in this action.

Appendix F

FACTS

On March 14, 1978, a four-count indictment was brought against petitioner Morrison, consisting of counts of carnal abuse, forcible rape, impairing the morals of a child and private lewdness, all in connection with the alleged rape by Morrison of a 15 year old girl who worked for him. Morrison waived his right to a trial by jury, and in March, 1979, a bench trial took place over six days. The State's case consisted of testimony by the victim and her mother, as well as scientific evidence attempting to establish that Morrison had committed the rape. The victim testified that she had worked after school at Morrison's fish store, and that on the day in question, Morrison had asked her to accompany him on several deliveries. She stated that after stopping at a few bars, Morrison drive her to his apartment, where, after forcing her onto his bed, he raped her. The victim testified that Morrison then drove her home. After she eventually told her mother what had happened, the victim stated, her mother called the police who came and took her to the hospital. At the hospital, various studies were performed, including vaginal washes used to detect the presence of sperm. After being examined, the victim went with Paterson Police Detective Dolores Most and two other police officers back to Morrison's apartment. It was the victim's testimony that Detective Most remained at the apartment, and that she was accompanied home by another police officer.

The State called the victim's mother, who testified that after her daughter told her of the rape, the mother retrieved her daughter's underpants, which she said felt sticky, and later gave them to the police. Police Officer Talarico testified that he took the underwear and delivered it to the Police Laboratories.

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Detective Most took the stand and testified that she had gone to Morrison's apartment with the victim, where they were let in by Wesley Harris, a friend of Morrison who lived in the same building. Most stated that she had photographs taken of the apartment, and that she took the sheet from Morrison's bed. At this point in the testimony, defense counsel objected, stating that unless Most had had a search warrant or some other justification for taking the sheet, the testimony regarding the sheet, and the sheet itself, could not be offered in evidence. It soon became clear, however, that defense counsel had failed to request discovery prior to trial, and as such, was unaware that the search had taken place and that the State was in possession of the sheet. Because of the failure to conduct discovery, defense counsel had not been able to timely move to suppress the evidence prior to trial, pursuant to New Jersey Court Rule 3:5-7(a). The court, while stating that had a motion been timely made there would have been a "very valid basis for suppression", nonetheless held that defense counsel could no longer make such a motion since trial had begun. The court criticized defense counsel for having been remiss in failing to request discovery, noting that at least two reports—a chemical analysis of the bedsheet ordered by the State, and a police report prepared by Most—clearly indicated that the State had Morrison's sheet in its possession. Defense counsel's objection was overruled, and Most stated that the sheet, which had some stains and hairs on it, was sent to the Police Lab.

The State then called a number of witnesses who had performed various lab studies on the stains and hairs found on the sheet, on blood and hair exemplars provided by the victim and Morrison, on the victim's underwear, and on the victim's physical examination results. These

lab technicians collectively established that: stains on the seized bedsheet were positive for sperm from a man of blood type "O"; stains on the victim's underwear were positive for sperm from a man of blood type "O"; some of the vaginal tests performed at the hospital showed the presence of sperm; Morrison's blood type is "O"; and hairs recovered from the bedsheet were similar to head hair of both Morrison and the victim.

The defense called four witnesses and the defendant himself, who developed a different version of the facts. It was defendant's testimony that he owed money to the alleged victim, and that she and her mother had been persistently demanding that she be paid. Morrison stated that on the day in question, he had been unable to pay his employee since the store had been robbed the night before (this testimony was corroborated by Mack Ross, co-owner of the fish store), so he went to make collections—not deliveries—from three bars that owed the store money. Defendant testified that the purported victim insisted on going with him to collect. After all three bars were unable to pay him any money, according to Morrison, the two of them went to Morrison's apartment building to collect rent money that Morrison was owed from some tenants to whom he rented apartments. He testified that the girl went up to his room, that she sat on his bed, that he tried unsuccessfully to collect money from his tenants, and that they then returned to the store. Wesley Harris, friend and purported lessee of Morrison, had earlier testified that he was present in the room with Morrison and the victim for nearly the entire time that the two were in the building. Morrison also stated that he had sex with women, other than the victim, on the bed, and that Mack Ross would on occasion use his room and bed for a "sexual

outlet". According to Morrison, the alleged victim went home, and her mother later told Morrison that she would "fix him" for not paying her daughter. Morrison stated that subsequent to charges being filed, the mother had on various occasions indicated that she would drop them. Morrison said that on the Sunday before the trial began, he met with her and the victim at the mother's home, at which time the mother again suggested that she was no longer interested in the prosecution going forward. Morrison also reported that the victim admitted at this meeting that he had not raped her, and stated that she had been afraid that her mother would find out about the fact that she had been having sex with her boyfriend, also the father of her child.[2]

Defense counsel's summation dwelled largely on inconsistencies in the victim's testimony. Counsel also raised questions about the mother's admitted meeting with Morrison on the day before the trial began, suggesting that if the mother and the victim believed the rape had occurred, it would be odd behaviour to meet calmly with the defendant in their own house on the eve of trial. Finally, defense counsel discredited the significance of the scientific evidence, noting that the expert witnesses had admitted that the test results provided no positive identification beyond matching blood type, nor could they pinpoint when various events had happened.

The State's summation stressed that credibility was the key to the outcome of the case, noting that the judge's findings in this respect would turn on the witnesses' testimony, the "supportive" scientific evidence, and common

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[2] Earlier in the trial, the victim's mother had admitted on cross-examination that this meeting had taken place.

sense. The State analyzed the perceived weaknesses in the testimony of each of the defense's five witnesses, and then discussed the scientific evidence. The State recalled that the victim's underpants were reportedly sticky after the alleged rape had occurred, and that the stains on the bed were from a man of the same blood type as defendant. Because the vaginal washes had demonstrated the presence of sperm, the State maintained that defendant could only argue that the victim had had sex with her boyfriend on the day in question, but noted that the defense had not called the boyfriend to testify nor had him tested for blood type. In concluding, the State contended that common sense precluded a finding of innocence, for if Morrison's story were correct, it would make no sense for the victim and her mother to frame Morrison by a fabrication that placed the rape in a room where another witness (Harris) had been present.

After a recess, the judge returned and said: "I guess, gentlemen, that since I'm judge and jury and if I were to render a decision as you would get it from the jury, you would get a cut and dried answer of guilty or not guilty. But I think you're entitled to some of my observations before I give you the bottom line." The judge noted that there were discrepancies in both cases, but, after outlining the respective difficulties, the judge found that the inconsistencies in the defense's case outweighed those in the State's. After finding favor with the State's "common sense" argument, the judge stated in closing: "I won't comment anymore upon the testimony, gentlemen. But it's my opinion that the State has proven its case beyond a reasonable doubt, and it's my finding that the defendant is guilty [on all four counts]." The judge did not discuss the scientific evidence. Morrison was sentenced to eight-

to-ten years for the rape conviction; sentences on the other counts were shorter and made concurrent with that imposed for the rape conviction.

In appealing his conviction to the New Jersey Superior Court, Appellate Division, petitioner raised three arguments: (1) that the convictions should be merged since all four were based on a single criminal transaction; (2) that defense counsel's failure to make a timely demand for discovery and a timely suppression motion had deprived petitioner of his right to effective assistance of counsel and (3) that the trial court had erred in refusing to conduct a hearing to determine the legality of the search of petitioner's apartment and the seizure of his bedsheet. The Appellate Division held that petitioner had failed to demonstrate that his attorney's inadequacy was of "such magnitude as to thwart the fundamental guaranty of a fair trial." *State* v. *Edge*, 57 N.J. 580, 593 (1971). The Appellate Division then dismissed as "clearly without merit" petitioner's contention that the trial judge had erred in refusing to grant a suppression hearing. Petitioner's final argument, that all four convictions should be merged, was accepted by the Court. Finding that all charges arose from a single criminal transaction, the Appellate Division consolidated the convictions for carnal abuse, impairing the morals of a child, and private lewdness with the rape conviction. Accordingly, the convictions and sentences for the three lesser offenses were vacated. *State* v. *Morrison*, A-4157-78 (App. Div., Mar. 18, 1981).

In his petition for certification to the New Jersey Supreme Court, petitioner denominated two arguments: first, that he was deprived of the effective assistance of counsel, and second, that the standard for ineffective assistance of counsel used by the Appellate Division is unconstitu-

tional.[3] His petition was denied by the Supreme Court in May of 1981. *State* v. *Morrison*, 87 N.J. 368 (1981).

Over a year later, petitioner filed a petition for post-conviction relief with the Superior Court of New Jersey, Law Division. Petitioner again raised the issue of ineffective assistance of counsel, and challenged the trial court's failure to hold a suppression hearing or to exclude the evidence obtained during the search. Because these issues had been expressly adjudicated on direct appeal, the petition was denied pursuant to New Jersey Court Rule 3:22-5.

Petitioner filed this petition for a writ of habeas corpus in late April of 1983, rasing three arguments: (1) that he was denied effective assistance of counsel at trial in violation of his sixth and fourteenth amendment rights; (2) that New Jersey's standard for ineffective assistance of counsel is unconstitutional; and (3) that the warrantless search of petitioner's apartment and seizure of his

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[3] While petitioner's certification petition identified only these two "points" as argument headings, within "Point One"—titled "Petitioner Was Denied Effective Assistance of Counsel"— petitioner stated:

> Petitioner, at trial, was entitled to the constitutional guarantees of a fair trial, effective assistance of counsel and the exclusion of evidence seized from him in violation of the Fourth Amendment to the United States Constitution. *U.S. Const. Amend* 4 and 6; *N.J. Const. Art.* 1, par. 10; State v. Whitlow, 45 N.J. 3, 27 (1965); State v. Mingo, 77 N.J. 576, 581 (1978).

Certification Petition at 4. For reasons stated below, see *infra* at 7-8 and n.5, while it appears that the certification petition did raise the fourth amendment issue, we need not resolve this question.

bedsheet violated petitioner's fourth and fourteenth amendment rights. Respondent moves to dismiss the petition on the ground that petitioner has failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b).

DISCUSSION

1. Exhaustion

The exhauston doctrine set forth in 28 U.S.C. § 2254(b) provides that a federal court shall not grant a state prisoner's petition for habeas corpus unless he has fully exhausted all state judcial remedies. *Picard* v. *Connor*, 404 U.S. 270, 275 (1971); *Jones* v. *Superintendent of Rahway State Prison*, No. 83-5277, slip op. at 4 (3d Cir. January 6, 1984); *Santana* v. *Fenton*, 685 F.2d 71, 73 (3d Cir. 1982). The exhaustion requirement is met either when the petitioner's federal claim has been fairly presented to the highest available state court, or when a means by which the petitioner can reasonably present a claim no longer exists. *United States ex rel. Greisler* v. *Walters*, 510 F.2d 887, 892 (3d Cir. 1975). Unless all claims brought before the court have been exhausted, the entire petition must be dismissed. *Rose* v. *Lundy*, 455 U.S. 509, 522 (1982).

Respondents contend that petitioner has not exhausted his state judicial remedies with regard to any of his claims. Specifically, it is argued that petitioner's failure to appeal the denial of post-conviction relief to the Appellate Division or State Supreme Court leaves unexhausted petitioner's claims of ineffective assistance of counsel and violation of his fourth amendment rights. Respondents' brief at 7. Respondents further argue that petitioner's

claim challenging the constitutionality of the standard for ineffective assistance of counsel applied by the state courts is unexhausted because petitioner never presented it to the Appellate Division or in the post-conviction relief proceeding. *Id.* at 6. We find that respondents' arguments misrepresented exhaustion doctrine and, as a result, misconstrued the relevant events in this case.

Respondent incorrectly states that all avenues of post-conviction relief must be exhausted before a claim is cognizable in a habeas corpus petition. In fact, once a claim has been directly appealed to the state's highest court, it will be considered to be exhausted, even if no post-conviction relief is sought. *United States ex rel. Hickey* v. *Jeffes*, 571 F.2d 762, 764 (3d Cir. 1978); *see Jones*, No. 83-5277, slip op. at 4 (one opportunity for state courts to consider claim is sufficient for exhaustion). There is no dispute that petitioner fairly presented his claim for ineffective assistance of counsel to both the Appellate Division and the New Jersey Supreme Court. Regarding petitioner's claims that the New Jersey standard for measuring effective assistance of counsel is unconstitutional, we do not view this argument as independent from petitioner's broader sixth amendment claim of ineffective assistance of counsel. Rather, we consider the former claim to be subsumed in the latter argument: that petitioner was deprived of the effective assistance of counsel as measured by a federal constitutional standard. Since our inquiry into petitioner's claim of ineffective assistance of counsel is of course controlled by federal interpretation of sixth amendment requirements, it would not be necessary to pass on the constitutionality of New Jersey's standard for determining the effectiveness of counsel. To the extent that these arguments merge, therefore, we find

that petitioner clearly exhausted his claim of ineffective assistance of counsel.[4]

Finally, with respect to petitioner's claim that his fourth and fourteenth amendment rights were violated by the warrantless search and seizure of the bedsheet, which was subsequently admitted into evidence, we find that we are precluded from considering this claim under the doctrine established in *Stone* v. *Powell*, 428 U.S. 465 (1976). In *Stone*, the Court ruled that "where the State has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." *Id.* at 494. Petitioner has not argued that he was denied an opportunity to litigate fully and fairly his fourth amendment claim, nor does the record in any way support such a contention. To the contrary, petitioner has argued that his counsel simply failed to utilize the available means for challenging unlawfully obtained evidence. Thus, we conclude that petitioner's fourth amendment claim is plainly not cognizable as a basis for habeas corpus relief. As such, § 2254 is inapplicable and there is no need to inquire whether petitioner

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[4] Even were we to consider these arguments as separate, we have no doubt that petitioner in fact exhausted both. In his brief to the Appellate Division, petitioner urged the court to apply the standard for determining effective assistance of counsel announced in *State* v. *Anderson*, 117 N.J. Super. 507, 519 (App. Div. 1971) ("normal customary skill and knowledge" standard), as opposed to that enunciated in *State* v. *Edge*, 57 N.J. 580, 593 (1971) ("farce or mockery" standard). Defendant's Brief at 16-17. While the *Anderson* formulation is the same as that applied by the Third Circuit, *United States* v. *Swinehart*, 617 F.2d 336, 340 (3d Cir. 1980), the Appellate Division chose to follow *Edge*.

exhausted this claim before the state courts. See *Engle* v. *Isaac*, 456 U.S. 107, 120 n.19 (1982).[5]

In sum, we find that petitioner has exhausted all claims which afford a ground for habeas corpus relief. Accordingly, the State's motion to dismiss will be denied.

2. The Merits

To prevail on this petition for a writ of habeas corpus, Morrison must show that he was deprived of the effective assistance of counsel and that he was thereby prejudiced. *United States* v. *Baynes*, 687 F.2d 659 (3d Cir. 1982). To establish ineffectiveness, it must be clear that petitioner's attorney did not exercise "the customary skill and knowledge which normally prevails at the time and place." *Moore* v. *United States*, 432 F.2d 730 (3d Cir. 1970); *accord Baynes*, 687 F.2d at 665; *United States* v. *Swinehart*, 617 F.2d 336 (3d Cir. 1980). Application of this standard "entails a careful inquiry into the particular circumstances surrounding each case," *Baynes*, 687 F.2d at 665; moreover, impressive performance by an attorney at trial will not excuse insufficient pretrial investigation and preparation. *Moore*, 432 F.2d at 739.

We come quickly to the conclusion that petitioner's trial counsel was ineffective under the standard announced in *Moore*. Put simply, counsel failed to conduct any meaningful pretrial discovery, and thus was totally unaware that certain damaging evidence might have been the appropriate subject for a suppression motion. Counsel seems to have acted on the misapprehension that the State was obligated to turn over anything that the defense might be interested in examining. Little else was offered by way of excuse by petitioner's lawyer in the face of repeated criticism by the state trial judge, except for counsel's rather remarkable attempt to justify his conduct by noting that up until trial he had been told that the victim "didn't want to go ahead with this case." *See* Transcript of March 14, 1979, 102-115. The state trial judge recognized that there was a very valid basis for suppression, and we cannot conceive of any legitimate claim that the search and seizure was constitutional.[6] Based on the unmitigated negligence of petitioner's trial counsel in failing to conduct any discovery, combined with the likelihood of success of a suppression motion had it been timely made, we find that petitioner was deprived of effective representation.[7]

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[5] Although we decline to apply traditional exhaustion analysis to petitioner's fourth amendment claim as a basis for decision, were we to do so we would likely find that this claim was exhausted below. *See, supra* at n.3. Respondents concede that the fourth amendment claim was presented to the Appellate Division and the New Jersey Supreme Court. Respondents' Brief at 7.

[6] At oral argument on the present petition, counsel for the State admitted that on the record before the Court there was no apparent justification for the search and seizure. *See* Transcript of December 20, 1983, 11-12.

[7] We are aware that there is not complete uniformity among the circuit courts as to the proper standard by which to measure effectiveness of representation, *see generally Romero* v. *United States*, 103 S. Ct. 236 (1982) (White, J. dissenting from denial of certiorari) (canvassing cases), and that the Supreme Court may soon resolve the issue. *See Washington* v. *Strickland*, 693 F.2d 1243 (5th Cir. 1982), *cert. granted*, 103 S. Ct. 2451 (1983). Even were we to adjudge this case under the most limited sixth amendment standard of review currently in use—the "farce and

(Footnote continued on following page)

Appendix F

We arrive at our conclusion that this ineffective representation prejudiced petitioner with only slightly more difficulty. Prejudice is to be measured under the harmless error doctrine, for, as announced in *Baynes*, 687 F.2d at 670-71 (emphasis in original):

> [A]ny substantial doubt must be resolved in favor of the defendant, inasmuch as *Chapman* [v. *California*, 386 U.S. 18 (1967)] permits a finding of harmless error only where it is concluded *beyond a reasonable doubt* that no prejudice resulted from the identified constitutional violation. . . . In other words, [a petitioner] need only demonstrate that his attorney's ineffectiveness was not harmless error "beyond a reasonable doubt."

We cannot conclude that the failure of petitioner's lawyer to make a timely motion to suppress was harmless beyond a reasonable doubt. The evidence in this case was not overwhelming—the trial judge noted that there were inconsistencies with both the State's and defendant's cases. While there is no question that the credibility of the witnesses was of great significance, the State clearly viewed the "scientific" evidence as an important part of its case.

(Footnote continued from preceding page.)

mockery" standard, *see United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950)—we would be constrained to find that petitioner had been deprived of the effective assistance of counsel, and conclude that those courts utilizing this standard would come to the same result. See *United States* v. *Aulet*, 618 F.2d 182, 187-88 (2d Cir. 1980) (failure to make pretrial motions may, where there is a high likelihood of success, constiute ineffectiveness under "farce and mockery" standard).

Appendix F

In the State's opening argument, it stated that the scientific evidence would have "a strong bearing on the Court's decision as to guilt or innocence", and in its summation, the State asked the judge to assess credibility, in part, by considering the "supportive facts" produced in the form of the scientific evidence. Apart from the State's own evaluation of the case, it is hard to underestimate the significance in a rape case of a sheet, taken from the defendant's own bed within a short time after the alleged rape occurred, which has semen stains matching defendant's blood type and hairs matching the head hair of both defendant and the victim.

The State argues that the introduction of the sheet, and evidence obtained therefrom, was not prejudicial because it was petitioner's own sheet, and any stains or hairs linked to him would only corroborate the obvious; with regard to the hairs recovered from the sheet and linked to the victim, the State claims that this only established that the victim was at some point on petitioner's bed, a fact that petitioner admitted at trial. We must reiterate, however, that in order to find prejudice we need not determine that the evidence derived from the sheet constituted the basis for the finding of guilt; rather, we need only decide that its admission was not harmless beyond a reasonable doubt. The mere fact that defendant had some explanation for the damaging circumstantial evidence—for example, that both he and his friend Ross had had sex with other women on the bedsheet, or that the victim was, in fact, on his bed on the day in question—does not detract from our conclusion that the sixth amendment violation was not harmless. Had the evidence derived from the sheet been suppressed, it may well be that defendant would not have felt the need to offer these explanations. In short, without the direct circumstantial evidence the

sheet provided, evidence that the victim was on a bedsheet containing semen stains of the defendant, the trial would be a different one than that which resulted in petitioners' conviction. Under such circumstances, there is at least a reasonable doubt that the constitutional error was harmless.

Finally, the State makes much of the fact that the state trial judge, in announcing his findings, made no mention of the sheet, or of any of the evidence obtained from the sheet. Recognizing the deference that is to be given state court findings of fact in a subsequent haiscas proceeding, *see generally, Sumner* v. *Mata*, 449 U.S. 539 (1981) (state court factual determinations to be given "presumption of correctness"), there is no basis for concluding in this situation that the "findings" made by the state trial judge represented the complete factual underpinning for his ultimate finding of guilt. To the contrary is the judge's own characterization of his findings as simply "some of my observations before I give you the bottom line." After discussing some of the testimony in the case, the judge interrupted himself, stating "I won't comment anymore upon the testimony, gentlemen." The obvious inference to be drawn from this last statement is not that the undiscussed testimony played no part in the judge's decision, but merely that it would remain just that: undiscussed. We do not believe that because the trial judge chose to share some of his thoughts with the parties, that petitioner should thereby be foreclosed from claiming prejudice in the absence of an explicit reference by the judge to the otherwise damaging evidence.

In sum, we find that petitioner was deprived of his sixth amendment right to the effective assistance of trial counsel, and that this deprivation constituted error that

was not harmless beyond a reasonable doubt. Accordingly, petitioner is entitled to a new trial. The writ of habeas corpus will be granted.

Finally, we are appreciative of the efforts of Mr. William Staehle, who was appointed by the Court to represent Mr. Morrison, and whose work was of the highest quality.

HERBERT J. STERN
United States District Judge

DATED: January 30, 1984

APPENDIX G

Judgment of the Court of Appeals for the Third Circuit Entered February 27, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5138

MORRISON, NEIL

vs.

ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, and JOHN J. RAFFERTY, Superintendent, Rahway State Prison

Irwin I. Kimmelman, Attorney General of the State of New Jersey, and JOHN J. RAFFERTY, Superintendent, Rahway State Prison,

Appellants

(D.C. Civil No. 83-1428)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix G

Present: GARTH and SLOVITER, *Circuit Judges* and LORD, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ———— District of New Jersey

and was argued by counsel October 30, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered January 31, 1984, as amended by order entered February 3, 1984, be, and the same is hereby vacated and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST

SALLY MRVOS
Clerk

January 18, 1985

Certified as a true copy and issued in
lieu of a formal mandate on February 27, 1985.
Test:

SALLY MRVOS
Clerk, United States Court of Appeals
of the Third Circuit.

* Hon. Joseph S. Lord, III, Chief Judge Emeritus, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX H

Order of the Court of Appeals for the Third Circuit Denying a Rehearing, Dated February 19, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5138

NEIL MORRISON,

Appellee

v.

IRWIN I. KIMMELMAN, Attorney General of New Jersey and JOHN J. RAFFERTY, Superintendent, Rahway State Prison,

Appellants

D.C. CIVIL NO. 83-1428

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and LORD, *District Judge**

* Hon. Joseph S. Lord, III, Chief Judge Emeritus, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix H

The petition for rehearing filed by appellants, Irwin I. Kimmelman, Attorney General of New Jersey and John J. Rafferty, Superintendent, Rahway State Prison, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

JOSEPH S. LORD
Circuit Judge

DATED: FEB 19, 1985

APPENDIX I

Order of the Court of Appeals for the Third Circuit Granting Stay of Mandate, Dated March 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5138

March 18, 1985

MORRISON, NEIL

vs.

ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, ETC.

Irwin I. Kimmelman, Attorney General of the State of New Jersey, and John J. Rafferty, Superintendent, Rahway State Prison, Appellants

(D. C. Civil No. 83-1428)

Present: GARTH and SLOVITER, *Circuit Judges* and LORD, *District Judge*

1. Appellants' Motion to Recall the mandate and stay the mandate pending application for certiorari together with affidavit in support of motion.

Appendix I

2. For your information the opinion was filed and judgment entered January 18, 1985. The order denying petition for rehearing was entered on February 19, 1985. This Court's mandate issued on February 27, 1985.

in the above-intitled case. Any Answer which would be due by March 25, 1985 will be forwarded upon receipt of same.

Respectfully,

SALLY MAVOS
Clerk
DIRECT DIAL
597-3136

CH
enc.

The foregoing Motion is granted.

By the Court

JOSEPH S. LORD
Circuit Judge

Dated: March 22, 1985

OPPOSITION

BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
JUL 3 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1661

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

IRWIN I. KIMMELMAN, Attorney General of New Jersey, and JOHN P. RAFFERTY, Superintendent, Rahway State Prison,

Petitioners,

vs.

NEIL MORRISON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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On the Brief:

WILLIAM E. STAEHLE, ESQ.

COUNTERSTATEMENT OF THE CASE

The District Court's findings of fact and conclusions of law are published at 579 F. Supp. 796, et seq. (D.N.J. 1984) and reproduced in slip opinion form in Petitioner's Appendix at 18-35 (hereafter "P.A. ___"). The District Judge found that "[t]he evidence in this case was not overwhelming." P.A. 32.

For his statement of the case, the Petitioner invites this Court's attention to the District Court's findings and relies upon that factual recitation. P.A. 20-27.

SUMMARY OF ARGUMENT

Due to the brevity of the Respondent's Argument, a summary is omitted, as well as a table of contents and a table of authorities in accordance with Rule 33.5(a)&(b).

ARGUMENT

AS PRESENTED IN THIS CASE, THE APPLICATION OF THE STONE v. POWELL DOCTRINE TO A SIXTH AMENDMENT CLAIM FOR INEFFECTIVENESS OF COUNSEL DOES NOT WARRANT THIS COURT'S REVIEW AT THIS TIME.

It must be noted at the outset that the first two questions which the Petitioners (hereafter referred to alternatively as "the State") urge this Court to review were never presented to the District Court. For this reason alone, this Court in its discretion should deny review. The State did indeed argue that the District Court was precluded from deciding the Fourth Amendment issue, but nowhere did they assert that the District Court was also precluded from deciding the Sixth Amerdment claim. The doctrines of both Stone and Wainwright are not jurisdictional, nor does the failure to apply them to the Sixth Amendment claim of the Respondent (hereafter referred to as "Mr. Morrison") constitute plain error.

Moreover, the Third Circuit's decision does not appear to be in conflict with the decision of any other federal court of appeals, despite the Petitioners' mistaken belief that it conflicts with the Second Circuit's decision in LiPuma v. Comm'r. Dept. of Corrections, 560 F.2d 84 (2d Cir.), cert. denied, 434 U.S. 861 (1977). In LiPuma the court held that the failure of petitioner's trial counsel to file a suppression motion did not constitute ineffective assistance of counsel under the circumstances of that case and also determined that there was no reasonable possibility of prejudice to the petitioner. 560 F.2d at 90-93. Having disposed of the Sixth Amendment claim, the court added in a short paragraph and footnote with little discussion at the end of a nine page opinion that "the case comes within the holding in Stone v. Powell." At best this statement was but an alternate holding, and more likely, it was mere dictum. See Allah v. Henderson, 526 F. Supp. 282, 285-86 (S.D.N.Y. 1981), aff'd mem., 697 F.2d 287 (2d Cir. 1982); accord, Morrison v. Kimmelman, 752 F.2d 918, at P.A. 5 (3d Cir. 1985) (labelling the statement "dictum").

What is further troubling about the State's Petition is the fact that no full and fair consideration was given by the State courts to Mr. Morrison's claim for ineffectiveness of counsel, even though he availed himself of every opportunity. When he presented his claim to the State appellate court on appeal of his conviction, that court in rejecting his claim applied a more rigid standard than the law required. See Morrison v. Kimmelman, 579 F. Supp. 796, at P.A. 29 n.4 (D.N.J. 1984). Compare United States v. Madrid Ramirez, 535 F.2d 125, 129-30 (1st Cir. 1976) with Moore v. United States, 432 F.2d 730, 737 & n.26 (3d Cir. 1970).

If the State appellate court had applied the proper standard, there is little question that either Mr. Morrison's conviction would have been overturned or at least the Sixth Amendment issue would have been remanded for a complete factual evaluation concerning the prejudice inquiry, which has yet to be put to rest.

Concerning the third question presented by the Petitioners, the context in which the State trial judge made his "findings of fact" is so nebulous that the issue of what deference under 28 U.S.C. Section 2254(d) his remark should be accorded ir not adequately presented for this Court's review. A perfunctory ruling on a bail application during which the trial judge made an ambiguous reference to the bedsheet is not a sufficiently reliable occasion for according deference to his remark, on which the Respondent's entire Sixth Amendment claim is now sought to be defeated. Even if this Court were to review this narrow issue and find that deference should be accorded to the State trial judge's comment, that would not necessarily conclude the prejudice inquiry, and the remand ordered by the Court of Appeals would still be the most appropriate disposition.

CONCLUSION

For the foregoing reasons, Pespondent Neil Morrison, urges this Court to deny the State's Petition for Certiorari.

Respectfully Submitted,

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Wm E. Staehle
By: WILLIAM E. STAEHLE, ESQ.

Dated: July 3, 1985

AFFIDAVIT OF SERVICE

JUANITA R. NICKERSON, of full age, under penalty of perjury, says:

1. I am a secretary for the law firm of Bozonelis, Staehle and Woodward.

2. At the direction of William E. Staehle, Esq., on July 3, 1985, I filed the attached Brief for Respondent in opposition to Petition for Certiorari upon the Clerk of this Court, and I served it upon the attorney for the Petitioner by depositing it in the United States Post Office in Chatham, New Jersey with first-class postage prepaid and addressed as follows:

Alexander L. Stevas, Clerk
U.S. Supreme Court
1 First Street, N.E.
Washington, DC 20543

Allan J. Nodes, DAG
Division of Criminal Justice
Appellate Section
Richard J. Hughes Justice Complex
Trenton, NJ 08625

3. I state that under penalty of perjury, the foregoing is true and correct to the best of my knowledge.

Juanita R Nickerson
JUANITA R. NICKERSON

Executed on July 3, 1985
County of Morris
State of New Jersey

REPLY BRIEF

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY and JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,

Petitioners,

-vs-

NEIL MORRISON,

Respondent.

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STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case as presented in the Petition for Certiorari with the following additional comments.

On April 18, 1985, petitioners filed their Petition for Certiorari. On June 3. 1985, this Court ordered respondents to file a responding brief to reach this Court no later than July 3, 1985. On July 3, 1985, respondents mailed copies of their responding brief to this Court.

LEGAL ARGUMENT

POINT I

THE CONTENTIONS RAISED IN THIS PETITION WERE CONSIDERED BY THE COURTS BELOW.

Respondent contends that the petitioners never presented the first two issues raised in the petition for certiorari to the district court. This allegation is somewhat misleading. The fact is that respondents did not raise these issues, as they are currently formulated, in their initial petition for habeas corpus. Rather the respondents raised their Fourth Amendment and Sixth Amendment contentions as totally separate claims. Petitioners responded to these claims in a like manner. The district court decided to reach the merits of the Fourth Amendment issue in order to rule on respondent's Sixth Amendment claims. The actions of the district court presented the first two issues raised by petitioners for the first time.

Following this action by the district court petitioners presented these issues to the Third Circuit Court of Appeals for full plenary review. Thus, it is clear that the first two questions submitted for review were clearly presented for federal court review as soon as they were raised and that they are properly presented to this Court.

Even if this Court accepted respondent's arguments that the petitioners did not properly raise these issues in the district court, the petition should still be granted. It is clear that this Court may consider questions which have not been raised below. *See Capital Cities Cable Inc, v. Crisp,* — U.S. —, 104 S.Ct. 2694 (1984); *Carlson v. Green,* 446 U.S. 14, 16-17 n.2 (1980). Indeed this Court may consider issues which the parties expressly decline to raise. *United States v. Leon,* — U.S. — , 104 S.Ct. 3405, 3412 (1984). It must be remembered that the issues in question were raised before the Circuit Court of Appeals. This is not contested by respondent.

In regard to the fact that these issues were not considered by the district court petitioners note that the factors considered by this Court in analogous situations are the importance of the issues raised and whether the issues were raised before and adjudicated by the Circuit Court of Appeals. *United States v. Leon, supra; Capital Cities Cable, Inc. v. Crisp, supra; Carlson v. Green, supra; Vance v. Terrazas,* 442 U.S., 252, 258 n.5 (1979), reh. den. 445 U.S. 920 (1920). As noted in our petition, the issues presented in the present case and are both important and recurrent. These issues were clearly briefed by both parties in the Third Circuit Court of Appeals. Moreover, the contentions concerning the use of a Sixth Amendment claim to camouflage a claim barred by *Stone v. Powell,* 422 U.S. 465 (1976), were of such importance that they consume nearly the entire Circuit Court opinion. Based on the foregoing it is manifest that respondent's arguments in this regard are totally unfounded.

POINT II

A CONFLICT BETWEEN THE CIRCUITS EXISTS.

Respondent alleges that the Circuit Court opinion on the *Stone v. Powell*, 442 *U.S.* 465 (1976), issue is not in conflict with the decision of any other federal court of appeals opinion. This is plainly incorrect. Respondent apparently concedes that the position of the Second Circuit in *LiPuma v. Com'r, Dept. of Corrections*, 560 F.2d (1984), is in conflict with the holding of the court of appeals in this case. He bases his argument solely on the allegation that the holding in *LiPuma* is dicta. This is incorrect. The *LiPuma* court in fact criticized the lower court in that case for failing to consider the impact of *Stone v. Powell, supra*, on the petitioner's Sixth Amendment claims. *Id.* at 93 n.5. Having chastised the district court for such an omission it is unlikely that the Second Circuit would have committed the same transgression by relegating its findings to dicta. Rather, the *LiPuma* court provided a full explanation for its decision, which is in direct conflict with the decision in the present case. *Id.*

Moreover, respondent misinterprets the holding in *Allah v. Henderson*, 526 F.Supp. 282, 285-286 (S.D.N.Y. 1981), aff'd 697 F.2d 287 (2d Cir. 1982). Respondent cites this case for the proposition that the holding in *LiPuma* is dicta. In *Allah* the district court did in fact surmise that it was arguable that the *LiPuma* holding was dicta. 526 F.Supp. at 286. However, immediately after this surmise the *Allah* court specifically stated that the *LiPuma* holding was binding on the district court. The court then specifically followed *LiPuma* and dismissed the petition for habeas corpus. This decision was affirmed in a memorandum opinion by the Second Circuit Court of Appeals. 697 F.2d at 287.

Based on the foregoing it is certain that by both their words and their actions the courts of the Second Circuit have demonstrated that they are in conflict with the opinion of the Third Circuit in this case as well as the Fourth Circuit in *Sallie v. North Carolina*, 587 F.2d 636, 648 (4th Cir. 1978), cert. den. 441 U.S. 911 (1978).

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PETITIONERS

BY: s/A.J.N.

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DATED: August 9, 1985

AMICUS CURIAE

BRIEF

Office-Supreme Court, U.S.
FILED
MAY 20 1985
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CLERK

NO. 84-1661

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, and JOHN P. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,

Petitioners,

vs.

NEIL MORRISON,

Respondent.

BRIEF OF THE STATE OF IOWA AND THE COMMONWEALTHS AND STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, FLORIDA, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, TENNESSEE, VERMONT, VIRGIN ISLANDS, WASHINGTON, and WYOMING

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NO. 84-1661

IN THE
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IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, and JOHN P. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,

Petitioners,

vs.

NEIL MORRISON,

Respondent.

BRIEF OF AMICI CURIAE ON BEHALF OF PETITIONERS IRWIN I. KIMMELMAN, ET AL. ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTERESTS OF AMICI CURIAE

The State of Iowa, and the thirty-three other amici states and commonwealths, through their respective Attorneys General, offer this brief as amici curiae in support of the petition for writ of certiorari sought by Irwin I. Kimmelman, et al. in the above-captioned matter. The amici states all

administer criminal justice systems within their jurisdictions to promote safety and welfare of their citizens. In view of the amici states the opinion of the Court of Appeals unduly undermines their interests in finality and repose without significantly furthering the deterrence function of the exclusionary rule. Because of the importance of finality and repose in the administration of criminal justice systems, the amici respectfully pray that the petition for writ of certiorari be granted.

STATEMENT OF THE CASE

The amici adopt the statement of the case of the petitioner.

REASONS FOR GRANTING THE WRIT

I. WHETHER STONE V. POWELL APPLIES BEYOND ITS STRICT FOURTH AMENDMENT CONFINES WHERE HIGHLY RELIABLE AND PROBATIVE EVIDENCE IS CHALLENGED IN A HABEAS PROCEEDING AFTER A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUE OF ADMISSIBILITY IN STATE COURT IS A QUESTION OF SUBSTANTIAL IMPORTANCE.

In Stone v. Powell, 428 U.S. 465 (1976), this Court held that a state criminal

defendant was barred from relitigating in federal courts a Fourth Amendment challenge to the admission of highly reliable and probative evidence where the defendant had a full and fair opportunity to litigate the issue in state court. The decision was based on the view that the primary purpose of excluding trustworthy but illegally obtained evidence from a criminal trial, was to deter unlawful police conduct in future cases. The Stone court believed that the deterrence function of the exclusionary rule would be adequately served by the threat of suppression in state court proceedings. The Court noted that any additional deterrence that might be obtained by allowing federal court reconsideration of Fourth Amendment questions cut too deeply into the state's strong interests in finality and repose. 428 U.S. 492-94.

The entire rationale of Stone applies with full force to this case which presents a claim which, though postured in Sixth

Amendment terms, is booted in the Fourth Amendment. No claim has been made that the failure of counsel to litigate the question of the admissibility of the highly incriminating bed sheets in this rape prosecution has tainted the factfinding process. The only policy reason for resurrecting the issue of admissibility in the federal courts would be promotion of deterrence. Just as in Stone, the marginal value of any additional deterrence that theoretically might be obtained is outweighed by the state's strong interest in finality and repose.

The Court of Appeals in this case made the broad observation that the Sixth Amendment "implicates an entirely different set of concerns than does the exclusionary rule." Morrison v. Kimmelman, 752 F.2d at 921. As a general proposition, the Court is correct. In Sixth Amendment cases where ineffective assistance is rooted in failure launch a Fourth Amendment objection to the admission of physical evidence, however, the fairness

concerns found at the core of the Sixth Amendment are not implicated. The issue here is not whether Stone should be extended to all Sixth Amendment contexts -- which it clearly should not -- but whether the rule may be applied where highly probative and reliable evidence was obtained allegedly in violation of the Fourth Amendment and the defense counsel failed to object. See Smith v. Maggio, 664 F.2d 109, 111 (5th Cir. 1981) (Stone applies whether or not opportunity to litigate is exercised); Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980) (Stone applies with equal force to procedural errors which thwart presentation of Fourth Amendment claims); United States ex rel. Maxey v. Morris, 591 F.2d 386, 388 (6th Cir. 1979) cert. denied Maxey v. Morris, 422 U.S. 912 (1979); (Stone cannot be awarded by simple action, whether intentional or not, if not raising constitutional objection). Cf. Abel v. Raines, 640 F.2d 1085, 1087 (9th Cir. 1981) (while First Amendment values

implicated in seizure of obscenity, challenge remains Fourth Amendment claim.

Analytical support for application of Stone in the Sixth Amendment cases involving admissibility of highly reliable and probative evidence may be found in Nix v. Williams, ___ U.S. ___, 81 L.Ed.2d 377 (1984). In that case, Williams argued that because the exclusion of evidence under the Sixth Amendment was designed to protect the right to a fair trial and the integrity of the factfinding process, the inevitable discovery exception to the exclusionary rule should not apply to cases where evidence is obtained in violation of the Sixth Amendment. Regardless of the character of the underlying infraction, however, the Court found that the purpose of the exclusionary rule is deterrence of unlawful conduct. Nix v. Williams, ___ U.S. at ___, 81 L.Ed.2d at 386. As in the Fourth Amendment context in Stone, the court in Williams noted that federal court suppression of the physical evidence

admitted in a state court proceeding that was allegedly obtained in violation of the Fifth and Sixth Amendment "would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." Id. at 389.

At a minimum, the question whether Stone applies in the factual context of this case presents a substantial question of constitutional law. Specific direction from this Court would assist lower federal courts in the exercise of their habeas jurisdiction over state court criminal justice.

II. WHETHER STONE V. POWELL APPLIES WHERE AN ATTORNEY FAILS TO OBJECT ON FOURTH AMENDMENT GROUNDS TO THE ADMISSIBILITY OF EVIDENCE IS RIPE FOR AUTHORITATIVE DETERMINATION BY THIS COURT.

This Court has on three occasions recognized, but for jurisprudential reasons declined to address, the question whether Stone v. Powell applies outside its narrow factual and legal context. In Brewer v. Williams, 430 U.S. 387 (1977), and Nix v.

Williams, ___ U.S. ___, 81 L.Ed.2d 377 (1984), the Court noted but did not consider whether Stone could be applied to bar a habeas challenge to highly reliable and probative evidence allegedly obtained in violation of Fifth and Sixth Amendment rights. See 430 U.S. at 414 (Powell, J. concurring); ___ U.S. ___, 81 L.Ed.2d at 391 n.7. Similarly, in Wainwright v. Skyes, 433 U.S. 72 (1977), the court recognized but did not consider the possible application of Stone in a Miranda context. Id. at 87, n.11. Williams I, Williams II, and Wainwright suggest that the question of the reach of Stone in non Fourth Amendment settings is a recurring problem. See also Moran v. Morris, 665 F.2d 900, 903 n.1 (9th Cir. 1981); Satchell v. Cardwell, 653 F.2d 408, 409 n.6 (9th Cir. 1981); United States v. Wilcox, 640 F.2d 970, 974 n.5 (9th Cir. 1981).

Unlike earlier opportunities when the issue was presented to this Court for discretionary review, a body of conflicting lower

court decisions now exists which illuminates the precise issue raised in this case. In Li Puma v. Com'r Dept. of Corrections, 560 F.2d 84 (2d Cir. 1977) cert. denied 434 U.S. 861 (1977), the court stated that "The fact that petitioner's claim is ostensibly grounded on the Sixth, rather than the Fourth Amendment, does not negate Stone's applicability, because at the heart of the case lies an alleged Fourth Amendment violation." Id. at 93, n.6. In contrast, however, the courts in Sallie v. State of North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) cert. denied 441 U.S. 911 (1979), and in the instant case held Stone inapplicable by noting the difference in rationale between Fourth and Sixth Amendment claims. See also Toliver v. Wywrick, 469 F.Supp. 583, 604, n.32 (W.D.Mo. 1979). Resolution of the conflict among the federal courts of appeal can be accomplished only by authoritative review by this Court.

CONCLUSION

For the above reasons, it is respectfully submitted that the petitions for a writ of certiorari in the above-captioned matter should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I caused three copies of this Amicus Brief in Support of the Petitioner to be served on counsel for the Respondent by first class mail, postage prepaid, at the following address:

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and that all parties have been served as required by Supreme Court Rules.

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JOINT

APPENDIX

Supreme Court, U.S.
FILED
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CLERK

No. 84-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY and JOHN P. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,

Petitioners,

-vs-

NEIL MORRISON,

Respondent.

BEST AVAILABLE COPY

JOINT APPENDIX

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PETITION FOR CERTIORARI GRANTED OCTOBER 8, 1985

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RELEVANT DATES OF IMPORTANCE

Superior Court of New Jersey, Law Division

March 14, 1978 - Passaic County Indictment No. 369-78 filed in the matter of *State v. Neil Morrison.*

March 13, 14, 15, 16, 19 and 20, 1979 - Trial held and judgment of conviction entered in *State v. Neil Morrison.*

June 7, 1979 - Sentencing of respondent held in *State v. Neil Morrison.*

August 3, 1979 - Bail hearing held and bail application denied in *State v. Neil Morrison.*

July 24, 1982 - Post-conviction relief hearing held and petition for post-conviction relief denied in *State v. Neil Morrison.*

Superior Court of New Jersey, Appellate Division

July 24, 1979 - Notice of Appeal filed in the matter of *State v. Neil Morrison.*

March 18, 1981 - Affirmance of respondent's conviction in *State v. Neil Morrison.*

Supreme Court of New Jersey

May 15, 1981 - Certification denied in *State v. Neil Morrison.*

United States District Court for the District of New Jersey

April 27, 1983 - Petition for *habeas corpus* filed in *Morrison v. Kimmelman, et al.*

June 13, 1983 - Motion to dismiss the petition filed in *Morrison v. Kimmelman, et al.*

December 20, 1983 - Hearing on the petition for *habeas corpus* and motion to dismiss held in *Morrison v. Kimmelman, et al.*

January 30, 1984 - Petition for *habeas corpus* granted in *Morrison v. Kimmelman, et al.*

Third Circuit Court of Appeals

January 30, 1984 - Notice of Appeal filed in *Morrison v. Kimmelman, et al.*

February 21, 1984 - Notice of Motion filed for a stay of order granting *habeas corpus* pending determination by the Third Circuit in *Morrison v. Kimmelman, et al.*

March 20, 1984 - Motion for a stay of order granted in *Morrison v. Kimmelman, et al.*

January 18, 1985 - Order of the district court vacated and matter remanded in *Morrison v. Kimmelman, et al.*

January 30, 1985 - Petition for rehearing and rehearing *en banc* filed in *Morrison v. Kimmelman, et al.*

February 19, 1985 - Petition for rehearing denied in *Morrison v. Kimmelman, et al.*

February 27, 1985 - Mandate issued remanding to the district court in *Morrison v. Kimmelman, et al.*

March 22, 1985 - Motion filed to recall the mandate and stay further issuance of the mandate pending petitioners' application for *certiorari* in *Morrison v. Kimmelman, et al.*

Supreme Court of the United States

October 8, 1985 - Petition for *certiorari* granted in *Morrison v. Kimmelman, et al.*

JUDGMENTS, ORDERS AND DECISIONS IN QUESTION

The State of New Jersey notes that all judgments, orders, and decisions of the state and federal courts appear in the appendix to the petition for *certiorari* and are therefore not reprinted herein. Specifically, petitioners direct this Court's attention to:

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit, Decided January 18, 1985 .....Petition for Certiorari at 1a

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division, Decided March 18, 1981 .....Petition for Certiorari at 12a

APPENDIX C

Order of the New Jersey Supreme Court, Dated May 18, 1981 .....Petition for Certiorari at 15a

APPENDIX D

Order of the United States District Court for the District of New Jersey, Dated January 30, 1984 .....Petition for Certiorari at 16a

APPENDIX E

Amended Order of the United States District Court for the District of New Jersey, Dated February 2, 1984.....Petition for Certiorari at 17a

APPENDIX F

Opinion of the United States District Court for the District of New Jersey, Dated January 30, 1984
.....Petition for Certiorari at 18a

APPENDIX G

Judgment of the Court of Appeals for the Third Circuit, Entered February 27, 1985
.....Petition for Certiorari at 36a

APPENDIX H

Order of the Third Circuit Court of Appeals Denying a Rehearing, Dated February 19, 1985
.....Petition for Certiorari at 38a

APPENDIX I

Order of the Court of Appeals for the Third Circuit Granting Stay of Mandate, Dated March 22, 1985
.....Petition for Certiorari at 40a

TRANSCRIPT

Superior Court of New Jersey, Law Division
Transcript of trial dated March 13, 1979

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - PASSAIC COUNTY
INDICTMENT NO. 369-78
APP. DIV. NO.

THE STATE OF NEW JERSEY

v.

NEIL MORRISON,

Defendant.

- - - - - - - - - - - - - - - - - Passaic County Courthouse
Paterson, New Jersey
March 13, 1979

STENOGRAPHIC TRANSCRIPT
OF
PROCEEDINGS

BEFORE:

HONORABLE WILLIAM J. MARCHESE, J.S.C.

TRANSCRIPT ORDERED BY:

OFFICE OF THE PUBLIC DEFENDER
APPELLATE SECTION

APPEARANCES:

ELLIOT SOLOMON, ESQ.
Assistant Prosecutor
Attorney for the State

ROBERT I. GOODMAN, ESQ.
Attorney for the Defendant

ROCCO M. EMMA, C.S.R.
Official Court Reporter
Passaic County Courthouse
Paterson, New Jersey

I N D E X

W I T N E S S E S

NAME	DIRECT	CROSS
Marjorie Jones	17	49

E X H I B I T S

NO.	DESCRIPTION	IDENT.	EVID.
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MORNING SESSION

THE COURT: I want to see both counsel in chambers, please.

(The following discussion takes place in chambers.)

THE COURT: The defense attorney, Mr. Goodman, has indicated to the Court that his client desires to waive a jury and present the case to the Court acting as judge and jury.

I think, Mr. Goodman, if we decide to go that route, you should voir dire him on the record with respect to that.

MR. GOODMAN: I think so, Judge.

THE COURT: And with respect to the problems that have already been heard in this case.

Off the record.

(Discussion off the record.)

THE COURT: The record should reflect that there have been two pretrial motions made by the State. One for a merger--a consolidation, I should say, of two indictments, Indictment 369-78 and Indictment 222.

MR. SOLOMON: I think so.

THE COURT: (Continuing) 222-78.

I have ruled against the State on that motion and have directed that the two indictments be tried separately ultimately because of the undue prejudice to a jury by reason of such consolidation.

Off the record.

(Discussion off the record.)

(Defendant enters chambers.)

MR. GOODMAN: For the record, Judge, I would like to indicate that we are now in chambers. However, you've consented and instructed me to have the defendant here while you're making this decision or placing the procedure on the record.

THE COURT: All right.

We are doing this in chambers, on the record, merely because the jury panel is already sitting in the courtroom and I didn't wish to inconvenience them any further by moving them out.

Mr. Emma, would you read back to Mr. Morrison what we started to put on the record here a few moments ago before he came in.

(The Following is read back by the Court Reporter:

"THE COURT: The defense attorney, Mr. Goodman has indicated to this Court that his client desires to waive

a jury and present the case to the Court acting as judge and jury.

I think, Mr. Goodman, if we decide to go that route, you should voir dire him on the record with respect to that.

"MR. GOODMAN: I think so, Judge.

"THE COURT: And with respect to the problems that already been heard in this case.

(Continuing) The record should reflect that there have been two pretrial motions made by the State. One for a merger--a consolidation, I should say of two indictments, Indictment 369-78 and Indictment 222.

"MR. SOLOMON: I think so.

"THE COURT: (Continuing) 222-78.

"I have ruled against the State on that motion and have directed that the two indictments be tried separately ultimately because of the undue prejudice to a jury by reason of such consolidation.")

THE COURT: The second motion of the State is still in abeyance, and that I think was to rule upon that prior to jury selection was premature. That, of course, was the motion by the State to allow the State to use and introduce, during the course of the trial, testimony relative to the

alleged second offense for the purpose of showing plan, modus operandi and so forth.

Now, that has not been ruled upon, and I did not intend to rule upon that until after jury selection and prior to openings. So that those two things have been considered.

Now, the defendant in making his decision to submit the case to the Court without a jury, must consider that I already know that there are two indictments. I know basically the allegations of the two indictments, because I've considered them in ruling upon the first motion.

Bearing in mind that if the matter were to be presented to a jury it's very possible that the jury would know nothing about the second indictment, I can't determine that now. At least they wouldn't be tried on the two. So he has to consider that and take that into his consideration, the fact that I'm not able to cut off a section of my mind, so to speak, and eliminate that from my mind. I know about it, and there's no way that I can change myself and tell myself to forget that there is a pending indictment. So ultimately the decision has to be that of Mr. Morrison,

after consultation with Mr. Goodman keeping those problems in mind that have and will occur.

Mr. Solomon, you indicated you wanted to put something on the record?

MR. SOLOMON: No.

The only other question being, your Honor, in addition to that which his Honor has fully explained for the record, the question of whether there would be any challenge to the Court should the Court decide to hear the case without the benefit of a jury.

I think the Court might be interested in a representation to that effect at this point in time, before any decision is made, if for no reason other than Court convenience and Court calendar.

MR. GOODMAN: I assume we are proceeding in this case, and you understand, Mr. Morrison, this is the Judge, and we are going to proceed and go ahead if you waive the jury.

THE DEFENDANT: Yes, I understand everything.

MR. GOODMAN: There's no consideration of any other judge, is there?

THE DEFENDANT: No.

MR. SOLOMON: Other than that, the State has no objection, your Honor, if the defendant wishes to have a bench trial. Given everything which has been laid out on the record, the State would have no objection to that procedure.

THE COURT: All right.

MR. GOODMAN: At this time, Judge, just before you proceed, I would like to have it noted on the record that this is purely the defendant's decision; that I've indicted to him that I have mixed feelings about the decision, and that I again made it very clear that it would be a personal decision on his part if he decides to waive the jury.

THE COURT: All right.

There's another consideration I think which is in Mr. Morrison's mind, which you indicated to me when you first came into chambers, is the fact that Mr. Morrison has a prior record.

MR. GOODMAN: Right.

THE COURT: And that that existence of that prior record, and if he were to testify before a jury, he fears that the existence of that prior record would have a very serious damaging effect upon the jury.

MR. GOODMAN: Right.

THE COURT: And he doesn't have to make up his mind at this point. But even at the time the State rests in the presentation of this case to the jury, he would then have to make up his mind whether to--he would have to make that election whether to testify, knowing that his prior criminal record would go before that jury or not testifying and forsaking his opportunity to present any testimony of his own. I think that's one of the many considerations that he has contemplating in making this decision whether to waive the jury or not.

MR. GOODMAN: That's correct, your Honor. He's related that to me.

THE COURT: Now, at this juncture, all I know is that there'a a prior record. I don't know what it is. At this point I'm not interested.

I'm going to terminate this particular hearing at this moment and suggest, Mr. Goodman, that you and Mr. Morrison go outside. You can go out into our office or you can go into the juryroom, which is empty now, and have a discussion with your client, reviewing those problems before you make your decision.

MR. GOODMAN: All right.

Judge, I appreciate it.

(A recess is taken.)

THE COURT: All right.

Mr. Goodman.

MR. GOODMAN: Judge, I've stated my position on this matter. The defendant definitely wants to waive a jury and try the case with the Judge.

THE COURT: All right.

Mr. Morrison, you're present. You hear the representation of Mr. Goodman?

THE DEFENDANT: Yes, I do.

THE COURT: Indicating that you wish to proceed without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: Is that a fact?

THE DEFENDANT: That's a fact.

THE COURT: You've listened to my statement of what problems have already occurred and been considered by this Court.

In view of those problems, and you have knowledge of them, is it your voluntary intention to waive a trial?

THE DEFENDANT: Yes, sir. Waive the jury.

THE COURT: Waive the jury, I'm sorry.

THE DEFENDANT: Yes, sir.

THE COURT: All right.

Gentlemen, I'll accept that and we will waive then the jury trial. We'll proceed with a trial before me.

I have observed Mr. Morrison listening to the problems as they have been presented. I think he understands them, and I think that it is his voluntary and understanding indication to waive the jury.

THE DEFENDANT: Thank you very much, your Honor.

THE COURT: All right.

(Discussion in chambers is concluded.)

(A luncheon recess is taken.)

AFTERNOON SESSION

THE COURT: All right.

Mr. Solomon.

MR. SOLOMON: Yes, your Honor.

What stage are we at right now?

THE COURT: I'm sorry?

MR. SOLOMON: What stage are we at right now?

THE COURT: I think, for the record, Counselor, you should make an opening statement on this.

MR. SOLOMON: I have no problem with that, your Honor.

Are we going to discuss the Rule 55 issue at the present time?

THE COURT: Mr. Goodman I don't think is opposed to it at this time, are you?

MR. GOODMAN: Judge, let the trial proceed and we'll see how it goes. If he could ask the question that I object to, then we'll go into it.

At this point I may not even object later on, but I don't want to do it in a hypothetical way.

THE COURT: All right.

MR. SOLOMON: My opening, your Honor?

THE COURT: Yes.

MR. SOLOMON: Your Honor, this is a case of State v. Neil Morrison. Mr. Morrison, as you're aware, has been charged in Indictment 369 Term of 78, a four count indictment with carnal abuse, rape, impairing the morals of a child and lewdness in private. The victim of this offense is a girl by the name of Marjorie Jones, who at the present time is 17 years old.

However, at the time of the offense, which arose on

October 13th, the incident occurred October 13th, 1977, she was at that time a 15 year old girl.

The evidence in this case is going to show that she was at that time an employee of the defendant, working for the defendant and an individual by the name of Mack Ross; that this defendant and Mack Ross at the time owned an establishment known as Superior Crabs, which was a seafood dealership operating at 137 North Main Street.

Miss Jones was a student at that time and would begin work at approximately five o'clock in the evening and worked until nine o'clock at night, five days a week, Monday through Friday. On October 13th, 1977, Miss Jones arrived at work at approximately five o'clock in the evening, whereupon she saw the defendant cooking some shrimps. She asked him, basically, what he was doing. He indicated to her that they were going to be delivered to certain locations and that she was going to go with him. She'll testify that she did not want to go, but because of the pressure which was placed on her by the defendant

at that time, with reference to her continued employment in his business, that if she didn't go she wouldn't be working there any longer, she finally agreed to go.

Certain deliveries were made, subsequent to which this defendant took Miss Jones to his apartment which was located on Park Avenue, I believe the address being 122 Park Avenue, whereupon he took her into his apartment. He spoke for some period of time with a Wesley Harris, had a drink with Wesley Harris. Then after he departed the premises, the defendant asked Miss Jones to come on to the bedroom with him. At that time she refused. Subsequently the defendant threw her on the bed and forcibly engaged in sexual intercourse with her and against her will, without her consent.

Thereafter, she was taken home by the defendant. She had a conversation with her mother, at which time she indicated what had happened.

She also was taken to the hospital that night where an examination was conducted upon her by a Dr. Donald Segroi, whose name is not on the witness list. I suppose at this point in time witness lists are irrelevant, since there's no question about a jury knowing any witnesses.

Dr. Segroi conducted the examination and took certain specimens, and JoAnn Tumminelli from the Prosecutor's Office, the Rescue Unit of the Prosecutor's Office, took those specimens to the laboratory.

I think the Court, at this point in time, understands what the allegations are by the State, what the factual circumstances are.

I would ask that the Court pay very, very careful attention to Miss Jones. She's a very soft spoken young girl.

I would also ask that the Court pay particular attention to the scientific evidence which is going to be produced in this case, because that's going to have a strong bearing on the Court's decision as to guilt or innocence in this case.

Thank you.

THE COURT: Mr. Goodman.

MR. GOODMAN: Your Honor, the defendant takes the position of a general denial of any improper acts. He acknowledges that the young lady worked in the store that he operated on a part time basis. He acknowledges that

he was with the young lady on the evening in question. The purpose of his being with the girl was to see if he could get some money to pay her off. He went to some restaurants in Passaic who owed him money, he was unsuccessful in getting money at those locations.

He went to the Park Avenue address with the young lady for the purpose of getting some money from tenants that he subleẗed his apartment to. The only purpose of having the girl with him was so that he could get this money and give it to her and thereby be free to disassociate himself with her because he didn't want her to work in the place any longer, and he had told her that. Prior to the incident they had an argument, and it involved the mother and the daughter over this money that was owed to the daughter.

It's our position that this whole thing stems from the fact that the daughter didn't get the money that she was entitled to. We acknowledge that. In order to force the defendant to make the payments, these charges came about. They snowballed, and after awhile they got to a point

where they couldn't retract them anymore, and that's how the defendant got involved in this charge.

He denied vehemently any sexual relations with the young lady. We have witnesses who are within the apartment at the time, who were in the store after the act was allegedly committed who saw the young lady. We will point out the many inconsistencies in her statements, which are pure fabrications, which are recognized by the police woman who took the statements.

We think that because of this tremendous issue of credibility of the State's witness that the State will be unable to show beyond a reasonable doubt that the acts complained of actually occurred.

MR. SOLOMON: May I call my first witness, your Honor?

THE COURT: Yes, sir.

MR. SOLOMON: Yes.

I call Miss Marjorie Jones to the witness stand.

MARJORIE JONES, being first duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. SOLOMON:

Q Marjorie, why don't you take off your coat, I think it

might be easier. You're going to be here for a little while.

Marjorie, where do you live?

A Matlock Street.

Q Where on Matlock Street?

A Building 3 Apartment 13G.

Q All right.

Now, you're going to have to keep your voice up for the Judge to hear, and also for the Court Reporter to hear, because he has to make a record of this, and he has to hear everything that you say very clearly, okay?

Now, make believe that there's a man sitting in the back of this room who wants to hear also. You can see a couple of men there also. They may want to hear you. So keep your voice up so everybody in the courtroom can hear you, okay?

Where were you living in October of 1977?

A 109 North Main Street.

Q And what town is that located in?

A Paterson.

MR. SOLOMON: Can you hear, Mr. Goodman?

MR. GOODMAN: Yes.

Q How old are you now?

A Seventeen.

Q And on what date were you born?

A February the 9th, 1962.

Q In October of 1977 that would have made you 15 years old; is that correct?

A Yes.

Q During the month of October 1977, were you attending school? A Yes.

Q What school did you attend?

A School 4.

Q And where is that located?

A On Clinton Street.

Q Is that in Paterson?

A Yes.

Q And what grade were you in at that time?

A Eighth.

Q Now, do you recall if you were also employed at that time during that month?

A Yes.

Q And where were you employed at that time?

A At Superior Crabs.

Q And where is that located at?.

A 107 North Main Street.

Q Where is that building in relation to where you lived at that time?

A Next door.

Q What kind of business was Superior Crabs?

A Seafood.

Q And what did they do with the seafood?

A Delivered it.

Q As of October 13th, 1977, how long had you been working at Superior Crabs?

A For about two or three months.

Q And during the time that you were working there, how many days per week would you work?

A Five.

Q What days would those be?

A From Monday through Friday.

Q And what time did you get out of school Monday to Friday?

A 2:35.

Q And what time did you start working at Superior Crabs on those days?

A Five o'clock.

Q How long would you work each day?

A How long would I work?

Q Right. From five o'clock until when?

A Nine.

Q What kind of work did you do at Superior Crabs?

A Sell seafood.

Q And who did you sell the seafood to?

A To the customers out in the street.

MR. SOLOMON: I would like this marked as S-1 for identification, please.

THE COURT: S-1.

(Photograph marked S-1 for identification.)

Q Marjorie, I'm going to show you what's been marked as S-1 for identification.

Do you recognize that photograph?

A Yes.

Q And what is that a picture of?

A Superior Crabs.

Q And what part of the building is it a picture of?

A The front.

Q Does that accurately portray the building as it existed in October of 1977?

A Yes.

Q All right.

Now, when you first went to get this job-- you said you had been working there for about two or three months at that time as of October 13th?

A Yes.

Q So you started working in when, August?

A Yes.

Q When you went to get a job at Superior Crabs in August, who did you speak to at that time about getting a job? A Neil Morrison.

Q And, if you know, what did Neil Morrison have to do with that business?

A He was the owner.

Q And did he own it alone or did he own it with somebody else?

A With Mack.

Q Do you know who Mack is?

A Yes.

Q Do you know what his last name is?

A No.

Q You recognize him by sight?

A Yes.

Q Do you see Mr. Morrison in court today?

A Yes.

Q Would you please point to him and state his name? A That's Neil Morrison.

MR. SOLOMON: Your Honor, for the record, indicating the defendant.

THE COURT: Very well.

MR. SOLOMON: Thank you.

Q Now, at the time that you applied for the job, or at

anytime thereafter, did you have occasion to discuss your age with Mr. Morrison?

A No.

Q Did you ever discuss your age with him?

Yes.

Q When? A About two days after he hired me.

Q What, if anything, did you tell him at that time? A I told him I was 15.

THE COURT: Two days after you first talked to him?

THE WITNESS: Yes.

Q Now, do you recall working for the defendant on October 13th, 1977? A Yes.

Q And approximately what time did you arrive at work on that date? A Five o'clock.

Q At the time that you arrived there, who did you see? A Neil.

Q And when I say arrived there, that's at Superior Crabs; is that correct?

A Yes.

Q Where was he at the time you saw him?

A He was in the store cooking some shrimps.

Q He was where?

A He was behind the counter cooking some shrimps.

Q What, if anything, did you say to him when you saw him behind that counter cooking these shrimps?

A I asked him what he was going to do with them. He told me he had to deliver them.

MR GOODMAN: He had to what?

THE COURT: Deliver them.

MR. GOODMAN: Thank you.

Q What, if anything, did he indicate as to who was going to deliver them?

A He told me that I had to go with him.

Q At that time did you want to go with Neil Morrison to deliver these shrimps?

A No.

Q Had you ever been out on deliveries before?

A No.

Q What, if anything, did you tell him when he told you that you were going to have to make the delivery with him? A I told him that I didn't want to go. He told me that I had to go.

Q What happened then?

A And he kept telling me that I had to go, so I went.

Q Where did you go at that time?

A We went into the truck. Then we went to Passaic.

Q Passaic? A Yes.

Q Who drove the truck?

A Neil.

Q Where did you sit in the truck?

A On the passenger's side.

Q How many rows of seats are there in that truck? A One.

Q So you were seated next to Mr. Morrison then?

A Yes.

Q Have you ever been in Passaic before, or have you ever spent much time in Passaic?

A No.

Q Are you familiar with the town itself?

A No.

MR. SOLOMON: I ask that this be marked, your Honor, as S-2 for identification.

THE COURT: S-2

(Photograph marked S-2 for identification.)

Q Marjorie, I show you what has been marked as S-2 for identification.

Do you recognize that photograph?

A Yes.

Q What is it a picture of?

A The truck.

Q Is this the truck that you were in on the night of October 13th, 1977?

A Yes.

Q And does that picture accurately portray the truck as you saw it that night?

A Yes.

Q Marjorie, when you went to Passaic, where in Passaic did you go to?

A We went to three bars.

Q Three bars? A Yes.

Q Had you ever seen those bars before that night? A No.

Q And do you know the names of those bars?

A No.

Q All right.

What, if anything happened when you arrived at the first bar? A Neil got out of the truck and he took the shrimps with him and he went in the bar.

Q I didn't hear you.

He went out of the truck and what?

A He took the shrimps with him and he went in the bar.

Q And where were you at this time?

A In the truck.

Q How long did he remain in the bar?

A For about fifteen or twenty minutes.

Q And when he came out, did he have the shrimps at that time? A Yes.

Q He had the same shrimps that he had gone in with? A Oh, no.

Q Where did you go after you left the first bar? A We went to another bar.

Q What happened at that bar?

A He got out of the truck and went in the bar.

Q And what, if anything, did he bring in with him? A Excuse me?

Q What did he bring with him inside the bar?

A Oh, the shrimps.

Q Where were you at that time?

A In the truck.

Q And how long did he remain inside that bar?

A What?

Q How long did he stay inside?

A For about ten, twenty minutes.

Q When he came back out, did he have those shrimps still? A No.

Q And where did you go after you left the second bar? A To another bar.

Q And what happened at that time?

A He got out of the truck and went into the bar.

Q And where were you at that time when he went into the bar? A In the truck.

Q What did he bring with him into the bar?

A Some more shrimps.

Q And how long did he remain inside that bar?

A For about ten or fifteen minutes.

Q When he came back out, did he have the shrimps still? A No.

Q What, if anything, happened at that time?

A After he left the last bar, he got back in the truck and we went back to Paterson.

Q Now, from the time that you left Superior Crabs until the time that he made the last delivery at the last tavern, had he made any advances towards you?

A No.

MR. GOODMAN: I object to leading.

THE COURT: That's certainly a leading question, Counselor. There's no foundation for that at this point, is there?

MR. SOLOMON: Okay.

Q What, if anything, had he done to you up until that time? A Nothing.

Q Now Marjorie, when you went back to Paterson what, if anything, happened at that time?

A He told me that he had to make one more stop.

Q Where were you when he told you that?

A In the truck.

Q Was the truck moving at that time?

A Yes.

Q And who was driving at that time?

A Neil.

Q Did he indicate to you why he had to make this additional stop?

A He said that he was going to pick up my pay.

Q Where did he go to?

A On Park Avenue.

THE COURT: What avenue?

THE WITNESS: Park Avenue.

Q Is that Park Avenue in Paterson?

A Yes.

Q And what if anything, did you tell him about your desires to go to Park Avenue?

A I told him that I was ready to go home.

Q And what, if anything, did he tell you?

A He told me that he had to make one more stop.

Q All right.
Did he at that time go to Park Avenue?

A Yes.

Q And did he stop the truck on Park Avenue?

A Yes.

Q Where did he stop the truck?

A Where did he?

Q Where did he stop the truck?

A In front of an apartment.

Q When he stopped the truck, who got out of the truck? A He did.

Q Where were you at that time?

A In the truck.

Q What did he do?

A He told me to come upstairs with him.

Q And what, if anything, did you tell him?

A I told him that I will wait in the truck for him.

Q What happened after you told him that you would wait in the truck?

A He kept telling me to come upstairs with him. So I went upstairs with him.

Q How many times did he ask you to come upstairs? A About three or four times.

Q All right.

Now, could you describe what the outside of the building looked like that you were at?

A You have to go about five or six steps and they got a porch. The door, you have to go about--when you open the door you have to go about ten or eleven steps.

Q Is that inside the ten or eleven steps or outside? A Inside.

Q Now, when you got up those ten or eleven steps, where did you go then?

A Into an apartment.

Q How many rooms were in that apartment?

A One.

Q One room? A Yes.

Q Could you describe the apartment to the Judge? Could you describe it?

A It got chairs, a bed, tape player, clothes, a lamp and dresser.

MR. SOLOMON: I would like to have these marked as Exhibits S-3 through 5 for identification, please.

(Photographs marked S-3, S-4 and S-5 for identification.)

Q Marjorie, I show you what has been marked as

Exhibits S-3, 4 and S-5. Please look at those photographs.

Do you recognize the photographs?

A Yeah.

Q And what do the pictures show?

THE COURT: All right. We'll take a couple of minutes.

(A recess is taken.)

MARJORIE JONES, previously sworn, resumes the stand and testifies further as follows:

DIRECT EXAMINATION (Continued)

BY MR. SOLOMON:

Q Are you okay? A Yes.

Q Do you remember I showed you these three pictures here? A Yes.

Q Okay.
What do these pictures represent?

A That's the pictures of the apartment.

Q That you were in that evening?

A Yes.

Q Do the pictures accurately portray the apartment the way it was when you were in there?

A Yes.

Q At the time that you entered the apartment itself, was

anybody else present in the apartment when you walked in? A No.

Q Did anybody have occasion to enter the apartment after you and Neil went in?

A A lady.

Q And how long had you been there when she came in? A For about five minutes.

Q Did you know this lady?

A No.

Q How long did she stay?

A For about five minutes.

Q And after she left, did anybody else have occasion to enter the apartment?

A Wesley.

Q All right.
How long after she left did he come in?

A About ten minutes.

Q When he entered the apartment, who, if anybody did he talk to? A Neil.

Q And what, if anything, happened at that time?

A Neil told him to go get him a drink.

Q Let's back up for one second, okay.
This man named Wesley, had you ever seen him before this night? A Yes.

Q Where had you seen him before?

A At the Superior Crabs.

Q On how many occasions?

A A couple of times.

Q Couple of times? A Yes.

Q What, if anything, did Neil give to Wesley when he told him to go get something for them to drink?

A He gave him the money.

Q Was it paper money or was it change, do you remember? A It was paper money.

Q How long had Wesley been in the apartment when he left the apartment to go get these drinks?

A For about five minutes.

Q And did Wesley subsequently return to the apartment? A Yes.

Q When he returned to the apartment what, if anything, did he have with him?

A A bottle.

Q What kind of bottle was it?

A A liquor bottle.

Q Do you know what kind of liquor it was?

A No.

Q What, if anything, did they do with the liquor bottle? A Wesley gave it to Neil and they took a drink.

Q Who took a drink?

A Wesley and Neil.

Q They took a drink? A Yes.

Q What happened then? A And Neil asked me did I want any. I said, "No, I don't drink."
He gave the bottle back to Wesley and Wesley left.

Q When you went into the apartment in the beginning with Neil, what did Neil tell you to do, if anything? A He told me to have a seat.

Q And during the time that the lady came in during the time that Wesley was there, where were you?

A Excuse me?

Q Where were you during the time that the lady was in there and during the time that Wesley was there?

A I was sitting by the door in the chair.

Q Where were they, Neil and Wesley, while you were sitting in the chair?

A Where were they--say it again?

Q Were they still in the room having the drink?

A Yes.

Q Where were they in the room?

A By the door, standing up by the door.

Q Standing up? A Yes.

Q When Wesley came back with the bottle, how long did he stay after that?

A For about five minutes.

Q And when he left what, if anything, happened to that bottle? A Neil gave it to Wesley and Wesley left out the room.

Q Did you ever have anything to drink that evening?

A No.

Q What, if anything, happened when Wesley left?

A Neil shut off the light, he shut the door and cut off the lights.

Q Where were you at that time?

A In the chair by the door.

Q Where, if anywhere, did Neil go after he shut the door and turned off the lights?

A He laid on the bed.

Q How far was the chair that you were sitting in from the bed?

You can use something in the courtroom if you want to express the distance from where you are to where--

A The chair was right next to the bed.

Q Was the chair closer to the bed than I am to you now or further away?

MR. GOODMAN: I object. She said it was right next

to the bed.

THE COURT: I think we can amplify that.

How far away from the bed was it.

Q From where to where?

A Like the chair was right there and the bed was right there.

Q Right where?

You can get up if you want to. Describe it.

A Like the chair was right here by the door and the bed was like right here from the chair.

THE COURT: How far apart?

Q How many feet would that be between--

MR. GOODMAN: Or inches.

Q (Continuing) Or inches between the chair and the bed? Was it as much distance as there is between you and me now or was it closer or further, the chair from the bed? A It was closer.

Q Was it closer than from me to you?

A It was.

Q A little bit closer?

A Move over a little bit. Yeah, about like this.

MR. SOLOMON: For the record.

MR. GOODMAN: Indicating about a foot and a half, a foot and a half to two feet, your Honor.

MR. SOLOMON: Thank you.

Q How was Neil on the bed? What position was he in on the bed?

A He was laying across the bed.

Q Now, how were you sitting in the chair?

A I was sitting up straight in the chair.

Q What, if any, noise was there in the background? Did you hear any noise? A No.

Q After Neil laid down on the bed what, if anything, did he say to you?

A He asked me to come over there where he was.

Q And what did you tell him?

A I told him I would sit right there.

Q And what happened at that time?

A He told me that he wasn't going to bother me because I was his buddy and he was telling me that he loved me. He kept telling me to come over there. He pulled me by my arm and he had my arm up in my back.

Q Could you describe that to the Court how it was? Could you put your arm where your arm was at that time? You can stand up.

A Like I was sitting down in the chair and the chair got two arm things.

Q Take your time, relax.

A And he pulled my arm.

Q And where did he put your arm?

A He put my arm up in my back.

Q Could you show the Judge how it looked?

A He put my arm up in my back, up in my back like that, and he threw me on the bed.

MR. SOLOMON: For the record, your Honor, indicating the witness--

THE COURT: Indicating the arm pulled up behind her back, her right arm, Counselor.

Q How did it feel when the defendant pulled your arm behind your back?

A He hurt me.

Q When the defendant threw you on to the bed, how hard did he throw you?

A He threw me hard.

Q Once you landed on the bed what happened, if anything? A He laid on top of me.

Q And what happened at that time?

A And he had pulled my pants down, and I had pulled them back up. He had pulled them down and put his legs between mine.

Q How did you feel when he was trying to pull your pants down? A I was scared.

Q What were you doing at that time?

A When he pulled my pants down?

Q Right. A I was hollering, and I told him that I was going to tell my mother. He got mad and he put his hands over my mouth.

Q Now, once he put his legs between your legs what, if anything did he do?

A He stuck his penis in my vagina.

Q How did you feel while all this was happening?

A I was scared.

Q Were his pants off at that time or partially down or what? A Down to his knees--his ankles.

Q During the time his penis was in your vagina, did he ever ejaculate? A Yes.

Q Do you know what that means?

A Yes.

MR. GOODMAN: Your Honor, I respectfully ask that the leading questions be limited at this crucial point of time.

MR. SOLOMON: I don't know any other way to ask that, your Honor.

THE COURT: You could ask her what happened from that point on.

MR. SOLOMON: I'll try to avoid those kinds of questions in the future, your Honor.

Q How do you know he ejaculated?

A Because my clothes was wet.

Q What, if anything, happened after he ejaculated?

A He got up off of me. He got off me.

Q What, if anything, did you do after he got off of you? A I had got up and put my clothes on, and I was walking downstairs and he came behind me.

Q What clothes had he taken off of you, Marjorie? A What?

Q What clothing had he taken off of you?

A He didn't take none of my clothes off. My clothes was down to my legs.

Q What, if anything, happened after you started walking down the stairs? What, if anything, did he do?

A He was walking behind me and we went outside to the truck, and he opened the door for me and I got in the truck.

Q How did you feel at that time?

A At that time I didn't know what to do.

Q After you got in the truck, what did he do?

A He got in the truck.

Q And where, if anywhere, did you go at that time? A He took me home.

Q On the way home what, if anything, happened?

A He asked me was I still going to tell my mother, and I told him, "Yeah."

Q Approximately what time, if you recall, did you arrive? Did you go straight home or did you go elsewhere? A He went straight home.

Q Approximately what time did you get home?

A About something after nine.

Q Did you enter your house at that time?

A Yes.

Q Who entered the house?

A Excuse me?

Q Were you alone when you entered the house or was somebody with you?

A No, alone. My mother.

Q She was with you when you went in?

A No. When we came back to the house I went in the house.

Q At the time you went into the house, who, if anybody else, was inside the house?

A My mother.

Q What room was she in, do you remember?

A The living room.

Q Where did you go after you went inside the house? A Excuse me?

Q Where did you go once you went inside the house? A I went into my mother's bedroom.

Q Why did you go into your mother's bedroom?

A To change my clothes.

Q Is that where you keep your clothes?

A Yes.

Q Why did you change your clothes?

A Because my clothes was wet.

Q What, if anything, did you do after you changed your clothes? A Excuse me?

Q What did you do after you changed your clothes? A After I changed my clothes, I came out the bathroom and I saw my mother. She was in the bedroom.

Q And what happened then?

A And she asked me why was I changing my clothes, and I told her that my menstrual was on.

Q Okay.
Was your menstrual period on at that time?

A No.

Q What happened then?

A She asked me what did Neil do to me. I told her-- at first I told her he didn't do nothing to me. Then I started telling her what had happened.

Q After you told her what happened what, if anything, happened?

A She had called the cops.

Q When she called them, did they ever arrive that evening?

A Yes.

Q And approximately how long after they were called did they arrive, how much time passed?

A Fifteen minutes.

Q What, if anything, happened when the police arrived?

A I started telling them what happened.

Q How long did you talk to the police?

A For about fifteen minutes.

Q All right.

What, if anything, happened to the panties that you were wearing that you had changed?

A What happened to them?

Q To the panties that you had taken off at home.

A The cops took them.

MR. SOLOMON: I would ask that this be marked

as S-6 for identification.

THE COURT: S-6 for identification.

(Envelope and contents marked S-6 for identification.)

Q Marjorie, I ask you to look inside here. Look at what's in there, and I ask you--you can take them out if you want to--I ask if you recognize them?

A Yes.

Q Do you recognize those?

A Yes.

Q What are they?

A Those are the panties that I had on that night.

Q Marjorie, where did you go, if anywhere, after the police came?

A To the hospital.

Q Who went to the hospital with you?

A My mother.

Q Which hospital did you go to, do you remember?

A St. Joe's.

Q Do you remember what time you got to the hospital, roughly?

A No.

Q What, if anything, happened at the hospital?

A The doctors had examined me.

Q How long did they examine you for?

A For about ten to fifteen minutes.

Q And what part of your body did they examine?

A The bottom.

Q In the area of your vagina?

A Yes.

Q Did you have occasion to see anybody else at the hospital at the time you were there?

A Miss JoAnn--I don't know her last name.

Q Miss JoAnn?

A Yes.

Q Who does she work for?

A The Prosecutor.

Q Would that be JoAnn Tumminelli?

A Yes.

Q And do you remember if you saw anybody else there at that time? A Miss Dolores was there.

Q Miss Dolores? A Yes.

Q Miss Dolores, who is she?

A The police I think.

Q Is her last name Dolores Most?

A Yes.

Q Marjorie, for how long altogether were you at the hospital from the time you got there until the time that you left,

as best you recall?

A About an hour.

Q After you left the hospital where, if anywhere, did you go?

A We went back on Park Avenue.

Q And how did you get there?

A Miss Dolores and the other cop that was with her took me.

Q And what, if anything, happened as you were driving along? A She asked me if I see the apartment again would I recognize it.

Q Did you see the apartment as you were driving?

A Yes.

Q What, if anything, did you say?

A I told her that was the apartment.

Q What happened at that time?

A Me and her and the other cop got out and went upstairs to the apartment.

Q And did you show them the apartment?

MR. GOODMAN: I object, Judge.

THE WITNESS: Yes.

MR. SOLOMON: Identification, your Honor.

THE COURT: I'll allow that one.

Q At the time that you pointed out the apartment to

them, did you have occasion to see anybody else in the area of the apartment at that time?

A Yes.

Q Who did you see?

A Wesley.

Q Is this the same Wesley or a different Wesley? A The same Wesley.

Q The same Wesley as before?

A Yes.

Q Marjorie, when Neil Morrison, the defendant, placed his penis inside your vagina, did you want him to do that? A No.

MR. GOODMAN: I object, Judge.

MR. SOLOMON: It's an element of the offense, your Honor.

MR. GOODMAN: It's an improper question, did she want him.

THE COURT: I think it's an element to be considered, Counselor.

I'll allow it.

Q Did you want him to place his penis inside your vagina? A No.

MR. SOLOMON: I have no further questions, your Honor.

CROSS EXAMINATION BY MR. GOODMAN:

Q Do you have your birth certificate with you today, Marjorie? A No.

Q Did you know that you were going to be in this case today? A Yes.

Q Did they tell you to bring your birth certificate? A No.

Q Nobody told you to bring it?

A No.

Q Now, in October of 1977 you already had a little baby; is that right?

MR. SOLOMON: Your Honor, I'm going to object to that. It's highly improper under the law.

There's a statute which provides that kind of questioning of any victim of a sex offense.

MR. GOODMAN: There's no statute that pertains to asking a question whether she had a child before this incident occurred.

MR. SOLOMON: Your Honor, I'm going to refer the Court to New Jersey Statute Annotated 2A:83 or 84, if I'm not mistaken, which specifically provides that kind of questioning.

Now, that's why your Honor will recall in a conference that we had in chambers, at which time I

specifically asked counsel not to go into that, I asked the Court to instruct counsel not to go into it. It's highly prejudicial, highly prejudicial.

MR. GOODMAN: Since there's no jury here--

THE COURT: All right.

Mr. Goodman, are you familiar with this statute passed in 1976 referring to the admissibility of evidence in the prosecutions for rape and related offenses?

MR. GOODMAN: I'm not too familiar, Judge.

THE COURT: They are talking about prior conduct of a complaining witness in a rape case.

MR. GOODMAN: My impression was dealing with prior illicit sexual acts, or whether she was a prostitute or not, I'm not charging this girl with any illegal acts. I just asked her if she had a baby.

THE COURT: Well, I'll allow that question, as far as it goes.

MR. GOODMAN: Would you answer that, Marjorie?

MR. SOLOMON: Your Honor, I'm going to continue to object to it.

THE COURT: I'll allow it, Counselor. I'm going to allow that one question. I don't know if I'm going to allow

another question after that, but I'm going to allow that.

Q Marjorie, will you tell the Judge in October of '77 you already had a little baby; is that right?

A Yes.

Q And the father of that baby, his name is what?

MR. SOLOMON: Your Honor, I'm going to object. I don't see the relevancy.

THE COURT: How is that relevant?

MR. GOODMAN: It's relevant. I'll show you how it's relevant.

MR. SOLOMON: He's going to impeach this witness's reputation.

THE COURT: I don't know if he's impeaching anything, Counselor.

The mere fact that she has a baby is not outstanding to me, and it doesn't impress me one way or the other if he wants to put that information in. I don't know what's relevant about it, Counselor.

MR. GOODMAN: I'll show you in a minute, Judge.

THE COURT: All right.

I'll allow it for the moment.

Q What's the name of the father of the baby?

A Walter Alston.

Q You have to speak up.

Walter Alston? A Yes.

Q And in October of 1977 you were friendly with him right? A Who.

Q Walter Alston, you were going out with him and friendly, right? A Yes.

Q He used to come to your house and you would go out with him? A No. I don't go out.

THE COURT: She said, no, she wasn't going out with him.

Q I mean, in October of '77, not now, in October of '77, would you go out with him?

A No.

Q You weren't going out with him?

A No.

Q Well, do you remember on the night that we are talking about, that Walter was in the fish store when you came back from Park Avenue? Do you remember that?

A He wasn't inside.

Q He wasn't inside. I'm sorry. You're right.
He was outside the fish store?

A Yes.

Q And do you remember when you came back you went with him? A I went in my house.

Q But before you went in your house, didn't you go away with Walter?

A No, sir.

Q Or talk to Walter? A Yes.

Q You talked to him?

A Yes, I talked to him.

Q Now, by the way, do you have any school records with you today? A No.

Q Do you have anything at all to show how old you are? A My mother out there, she might have something, but I don't have nothing.

Q But you don't have nothing?

A No.

Q You got home from school that afternoon about two o'clock? A 2:35.

Q And what did you do when you got home?

A I went in the house and ate and stayed there until it was time for me to go to work.

Q And who was in the house with you that afternoon? A My mother.

Q Just your mother?

A And my sister who lives upstairs from us.

Q You live upstairs from your sister?

A My sister used to live upstairs from me.

Q And who else lived up there with your sister?

A Her husband.

Q Is that Richard? A Yes.

Q And were they home that afternoon?

A Yes.

Q And did you have your baby in the house too?

A Yes.

Q And did you see Walter during the afternoon?

A No, not until--I don't know if I seen him.

Q Well, let me refresh your recollection.

Isn't it a fact that Walter was in the house with you and the baby in the afternoon before you came to the fish store?

MR. SOLOMON: Your Honor, that doesn't refresh her recollection. It's a question. She's answered the question.

THE COURT: It's a question.

MR. SOLOMON: But she's answered it already. She says she doesn't remember.

MR. GOODMAN: I'm asking if she remembers.

THE COURT: It's cross examination.

I'll allow that question.

THE WITNESS: I don't know.

Q You still don't remember?

A No.

Q Well, do you remember that your mother wasn't home in the afternoon after you got there from school?

MR. SOLOMON: It assumes facts not in evidence. I would object.

THE COURT: What?

MR. SOLOMON: That assumes facts not in evidence.

MR. GOODMAN: Judge, this is cross examination. Everytime I ask a question, Counselor objects. There's no jury. I think that the witness ought to be permitted to answer the questions as best she can.

MR. SOLOMON: Your Honor, whether it's direct or cross, you can't put facts into a question which hasn't been proven in evidence. How can you say, do you remember that your mother wasn't there? There was no evidence that she was there.

THE COURT: Rephrase your question.

Q Marjorie, tell the Judge, after you got home from school, was your mother in the house with you, or were you alone in the apartment with your baby for a while?

A My mother was home.

Q Did she stay home the whole afternoon, or did she go out? A I don't know.

Q You don't remember.

Do you remember that Walter came into the house and played with the baby that afternoon?

MR. SOLOMON: Same objection. It places facts in evidence which are not in evidence yet.

THE COURT: Do you want to rephrase it? Just rephrase it and say did Walter come in the house. Never mind did she remember. Did he come in.

Q Did Walter come into the house that afternoon while you were there with the baby?

MR. SOLOMON: Objection, your Honor, repetitive. He's asked that question three times. She indicated she doesn't remember it.

THE COURT: I'll allow it.

MR. GOODMAN: I would appreciate it if counsel wouldn't be telling the witness that she doesn't remember it.

THE COURT: I'll allow it, gentlemen. Look, there's no jury here. You don't have to go into any fancy foot-work and argument in front of me. I'll hear the questions

and I'll hear the answers.

Q Marjorie, would you please answer that question?

THE COURT: Do you recall the question, Marjorie?

THE WITNESS: I don't remember.

THE COURT: Read the question back.

(The following question is read back by the Court Reporter:

"Question: Did Walter come into the house that afternoon while you were there with the baby?")

THE COURT: If you remember.

THE WITNESS: I don't remember.

Q You don't remember? A No.

Q Well, would you tell the Judge whether or not Walter used to come during the afternoons and spend some time with you and the baby in the house, not on that day, but on other afternoons, would he do that?

MR. SOLOMON: Is there any relevance to this, your Honor?

THE COURT: Oh, sure.

I'll allow it.

MR. GOODMAN: Let the record reveal that there's a lot of meditation and time that the witness is spending trying to

recollect this.

THE WITNESS: He would come over some afternoons cause most afternoons he be working.

THE COURT: I'm sorry, I didn't hear that.
Read that back.

(The following answer is read back by the Court Reporter:

"The Witness: He would come over some afternoons cause most afternoons he be working.")

Q And when he didn't work he would come over and play with you and the baby; is that right?

A Yes.

Q And you just don't remember whether he came that afternoon because it's a year and a half ago; is that the reason you don't remember?

A I don't know whether he came over that afternoon cause he work and he didn't get off work until five o'clock.

Q Can you tell the Judge whether or not he was working on that day, or don't you remember that?

MR. SOLOMON: If you want a little time to answer and you want a glass of water, you just tell the Judge or this lady right here and she'll give you whatever you want.

A I don't think I seen him that day.

Q Is it that you don't remember?

THE COURT: What do you want now, Counselor? She's already indicated she can't remember that.

MR. GOODMAN: I asked her. She's confused. She wasn't responsive to my last question.

I asked her if she remembered whether he worked that day, and I gather she doesn't remember.

THE COURT: Well, no, her answer was, as I understand it, she can't remember that.
Is that her answer?

MR. GOODMAN: All right.

THE COURT: Is that her answer, Mr. Emma?
Just a minute, Mr. Goodman.

(The following answer is read back by the Court Reporter:

"Answer: I don't think I seen him that day.")

Q Now, when Walter didn't work and he came to your house and he spent an afternoon with you and the baby, would you have relations with him sometimes?

A No, because my mother would be home.

Q But if your mother wasn't home?

A Sometimes.

MR. SOLOMON: Same objection under the same statute previously cited.

THE COURT: Counselor, I think I'm going to allow it.

Q You say that sometimes you did?

A Yes.

Q Now, you got to work around five o'clock, is that right?

A Yes.

Q And as soon as you got in, you say that Neil told you you were going to go with him to make some deliveries to Passaic, right?

A Yes.

Q So then you left a few minutes later?

A Yes.

Q And then you told the Judge that you made three stops in Passaic?

A Yes.

Q And you spent about ten or fifteen minutes waiting for him while he went into the places and delivered the shrimp; is that right?

A Yes.

Q Now, what did those shrimp look like?

A They was red like.

Q Red?

A Yes.

Q Now, they weren't shrimp, were they?

A They wasn't red. They was orange.

Q Orange.

But it wasn't shrimp?

A Yes, they was I know.

Q They were shrimp; are you sure of that?

A Yes, because he let me taste one of them, and I know shrimp.

Q And you know that that wasn't the first time you ever tasted some of Neil's shrimp?

A Yes.

Q That's the first time you ever tasted them?

A Yes.

Q Well, isn't it a fact that you and your sister--I think you have a younger sister, don't you?

MR. SOLOMON: I'm going to object to this. What is the relevance of all this?

MR. GOODMAN: Credibility, Judge.

THE COURT: As to whether she ever tasted shrimp, Counselor?

MR. GOODMAN: All right. Forget about it.

Q You spent ten or fifteen minutes in each place--maybe fifteen minutes in each place, right?

A Yes.

Q And he came back into the truck, and then you drove to Paterson; is that right?

A Yes.

Q It was still light out when you got to Paterson? A No. It was dark, but it wasn't too dark.

Q It was just getting dark, dusk by the time you got back to Paterson, right?

THE COURT: Well now, Counselor, let's not feed the word into her, please. I know that I allowed some latitude with leading questions on cross, but she indicated it wasn't dark, but it wasn't quite dark.

Q And then you went upstairs to the apartment, right? A Yes.

Q And the apartment had one room in it?

A Yes.

Q You had a chance to look around, and you saw only one room in the apartment?

A Yes.

Q And when you got in, Neil, did he lock the door? A No.

Q What? A No.

Q Now, before you came to testify today, this is a little while ago this morning, did you talk about locking the door to the Prosecutor?

A Yes.

Q And did he tell you what to say about when I ask you about the locking the door, did he tell you what to say? A No.

Q Well, did he say to you--

MR. SOLOMON: I'm going to object.

Q What did he say about the door being locked?

MR. SOLOMON: Your Honor, she's already answered that.

THE COURT: Counselor, she just testified the door wasn't locked.

MR. GOODMAN: I'm asking her what she said about what was said about the door being locked. It's very important, Judge, very important.

MR. SOLOMON: She answered the question. However, if nothing was said--

MR. GOODMAN: She didn't say that.

THE COURT: She said she spoke to you about the lock, but that you did not, the Prosecutor did not tell her what to say about the lock.

What's your next question?

Q Did you tell anybody that Neil slid a bar in order to lock the door when you got into the apartment? Did you ever say that to anybody?

A Yes.

Q And that's not the truth, is it?

A No.

Q Because you found out later that there was no lock on the door; isn't that true?

A Yes.

Q So that when you told the policeman that you saw Neil slide the latch over and lock that door, you knew that was a lie, right?

A Well, I thought the door had a lock on it, but I didn't know what kind of lock it was. I just thought the door had a lock on it the way it was set.

Q But when you told the police that night and said that you saw Neil slide that lock, you didn't really see him do that, did you?

A I didn't tell them that I saw Neil slide the lock.

Q Did you tell the police at one time that you unlocked the door? Do you remember that?

A No.

Q You don't remember telling the police lady that. May I have that report, please.

Do you remember telling Detective Dolores Most that Neil Morrison locked the door with one of those slide locks? Do you remember telling Detective Most that? Do you remember saying that to her?

A I remember telling her that he locked the door, I don't remember telling her that it was a slide lock.

Q And then do you remember telling her that Wesley came in and then he left the room, and that Neil again locked the door and then he cut the lights off? Do you remember telling her that?

A Yes.

Q But that wasn't true, was it, because there's no lock on the door? So you told that to the police officer twice.

Then after you told the police officer the two times, then you said that Neil said he was nice to you, "And when he got dressed Marjorie stated that she had unlocked the door."

You told the police woman that you unlocked the door and that they went downstairs to the truck and he drove her home? Did you tell that to the police woman? A Yes.

Q But there was no lock for you to unlock; isn't that right? A Yes.

Q All right.

Then you went back to the apartment and Policewoman Most showed you that there were no locks on the door; isn't that true?

Q So you made that all up.

A No. I thought there was a lock on the door, but I didn't know what kind of lock it was.

Q But when you went back you saw that there were no locks on the door.

So I say to you again, what's in here was made up by you; isn't that true?

A No.

THE COURT: She answered that a moment ago, Counselor. She said she didn't make it up, she thought it was a fact.

Q Now, you say that Neil was on the bed and you were on the chair?

A Yes.

Q And then you got on the bed and he got on top of you, right? A Yes.

Q And while he was on top of you he pulled your clothes off? A Yes.

Q Did you yell? A Yes.

Q You told the lawyer that there was no noise going on in the apartment, right?

A He said in the background.

Q In the background you didn't hear any noise, right? A No.

Q And when you yelled nobody came; is that right? A No.

Q Did you keep yelling while he was taking off your clothes? A Yes, and he put his hand around my mouth.

Q So he kept one hand on your mouth, right?

A Yes.

Q And what was he doing with the other hand?

A He had my arm up near my back.

Q So he was holding on to your arms, right?

A Yes.

Q And there's no question in your mind that that's where his two hands were? One is on your right arm and behind your back and the other is right over your mouth; is that right? A Yes.

Q And then he put his penis in your vagina?

A No, that was before, that was before he put his hand over my mouth.

Q Oh. He put his penis in your vagina before?

A When he had my arm in my back he had put--when he pulled down my clothes he had put his penis in my vagina.

Q Didn't you tell us a second ago that when you got right on the bed you still had all your clothes on, right? A Yes.

Q And then he put one hand on your mouth and one hand he had on your arm; is that right?

A Yes.

Q Well, was the next thing that he did was to put his penis in you? A No.

Q Well, did you keep screaming and hollering when he took his hand off your mouth, or did he keep his hand on your mouth so that you couldn't yell?

A When he took his hand off my mouth, he had got off of me then.

Q So that he kept his hand on your mouth all the time you were on the bed while he was on top of you; is that right? A State that again.

Q He kept his hand on your mouth all the time he was on top of you? A Yes.

Q And when he first got on top of you, you still had all your clothes on; is that right?

A Yes.

Q And you never took your clothes off yourself, did you? A No.

Q And you told the lawyer that when he put his penis in your vagina, your pants were down around your ankles; is that right? A Yes.

Q And you were wearing blue jeans?

A I don't remember what I was wearing.

Q Were you wearing pants?

A Yes.

Q Like slacks; is that right?

A I don't know. I don't remember.

You don't remember what you were wearing?

A No.

Q Now, you saw Wesley in the apartment; is that right? A Yes.

Q When you walked out of the apartment, did you call to Wesley? A No.

Q You told this lawyer a little while ago that you walked down the steps after you left the apartment; is that right? A I did.

Q Now, do you remember talking to a lady from the Prosecutor's Office? A Yes.

MR. GOODMAN: Excuse me, Judge. I just saw something here.

Do you have the statement from the lady from the Prosecutor's Office?

MR. SOLOMON: Yes.

Q Do you remember telling the lady from the Prosecutor's Office that you went up to the apartment and that Neil then locked the door behind him after entering

the apartment? Do you remember telling her that too?

A No.

Q You don't remember saying that to her?

A No.

Q If I told you that was in her report, would that help you to remember whether you told this lady, that's JoAnn Tumminelli?

Do you remember telling her that Neil then locked the door behind him after entering the apartment? Do you remember telling her that?

A After entering the apartment?

Q Yes.

But you just told the Judge there was no lock on the door, right?

A Yes.

Q Did you walk down the steps after this was all over?

A Yes.

Q Well, didn't you tell JoAnn Tumminelli that--see you're the victim according to this paper-- and did you tell her that the victim then ran down the steps? Did you say that to her?

A Well, I was walking fast down the steps, but I didn't run down the steps.

Q You didn't run down the steps?

A No.

Q So that if this says that you told--

MR. SOLOMON: I'm going to object. Go ahead. I'll object after the question is finished.

Q (Continuing) If this says that you told her that you ran down the steps, are you saying that JoAnn Tumminelli made that up?

MR. SOLOMON: Objection.

THE COURT: What's the objection, Counselor?

MR. SOLOMON: The objection is based on the impeachment of a witness from a report which he or she didn't prepare.

MR. GOODMAN: That's JoAnn Tumminelli's report. That's not the witness's statement.

MR. SOLOMON: And this witness wouldn't know if Miss Tumminelli made something up, made a mistake.

THE COURT: Yes. But the question is if she gave a statement or some kind of a statement to JoAnn Tumminelli, he can elicit questions with reference to that statement, I would think.

MR. SOLOMON: Well, I understand. But what you have there, your Honor, is not a signed statement by this witness.

THE COURT: I understand that it's a report of JoAnn

Tumminelli, right?

MR. GOODMAN: Right.

MR. SOLOMON: That's a report. The problem I have with it is, the report, as Mr. Goodman I'm sure will acknowledge, is based on a conversation had between this witness and Miss Tumminelli at the hospital and was prepared later on. Now, for this witness to say that Miss Tumminelli made it or was mistaken or whatever--

THE COURT: All right.

I'll sustain that part of it.

MR. SOLOMON: That's my only objection.

THE COURT: I'll sustain your objection to that.

She can only testify, Counselor, in answer to you whether or not she did say something of that nature to her.

Q Is is likely, Marjorie--

THE COURT: No. Now, are you going to speculate?

MR. GOODMAN: I kow this young lady is young and I'm not trying to fool her.

THE COURT: I understand.

MR. GOODMAN: Does she recall saying that

doesn't she recall saying that.

Q Do you remember telling JoAnn Tumminelli that you ran down the steps?

MR. SOLOMON: I'm going to object. The exact same question was asked of this.

THE COURT: The first answer, Counselor, was that she walked fast, that she didn't run.

Q Would you say that this all happened in ten or fifteen minutes from the time you got to the apartment up until the time you left?

A Say that again?

Q Would you say that all of this that you told the Judge about in the apartment happened within ten or fifteen minutes? A We was there longer than fifteen minutes.

Q About how long, twenty minutes?

A You are just talking about that particular thing?

Q Just in the apartment.

A About twenty or twenty-five minutes.

Q And then you went out of the apartment, whether you walked fast or ran, you got down into the truck; is that right? A Yes.

Q And you drove back to the crab store, right?

A Yes.

Q And then you told the Judge that you went right into the house and you changed your underwear?

A Yes.

Q And then you washed out the other pair that you had been wearing?

A Yes.

Q And then your mother saw you putting on a new pair of underwear?

A Yes.

Q And right after that you told her what happened? A Yes.

Q And then right after that you called the police, right? A Yes.

Q Did you get to the hospital at about 11:15 that night? A I don't remember what time it was.

Q All right.

Well, maybe I can refresh your recollection and show you a hospital record which says that--well, strike that.

You got into the hospital. How long did you wait before the doctor came to see you?

A I'd say about forty minutes or maybe an hour.

Q You don't remember?

THE COURT: How many minutes, I didn't hear you?

THE WITNESS: About forty minutes.

THE COURT: Forty minutes.

Q And the police were with you?

A Yes.

Q And you were all standing in the hospital for forty minutes?

A I don't know where the police had went at. But me and my mother and my sister were standing in the hospital waiting.

Q Did you look at a clock or anything?

A No.

Q You don't remember. All right.

Then you were examined. I show you a report that shows that you were examined at 11:50. In other words, ten minutes to twelve that night; is that right? A Yes.

Q So does that help to refresh your memory? Do you remember now that it was ten minutes of twelve when the doctor took your blood pressure and your temperature--pulse rather?

THE COURT: What's the relevancy, Counselor.

MR. GOODMAN: Just the time, Judge.

THE COURT: Well, if you're trying to show any contradiction, I don't see any contradiction of that testimony. I don't know what's important about it.

MR. GOODMAN: All right.

Q Now, isn't it true, Marjorie, that before you told your mother about this you came back from wherever you and Neil were, and you came into the fish store? Didn't you go into the fish store and play pinball? A No.

Q You didn't do that at all?

A No.

Q Do you remember going into the fish store, going out and coming back that night, two times you were in the fish store after you came back from the deliveries?

A No.

Q And isn't it true, Marjorie, that after you came back you met Walter that night?

A Yes.

Q And you were with him before you went back into the house; isn't that right?

A When I came back he was standing in front of my house waiting for me.

Q And how long did you stay with Walter the

night? A For ten minutes, for about ten minutes.

Q And you didn't stand in front of your house with Walter, but you had gone some place with him before you went into the house; isn't that the truth?

A No.

Q Now, at the time you were friendly with Walter, you weren't having any problems with him, right?

A No.

Q Now, you never had any black and blue marks on you or scratches on you when you got home from where you were with Neil, did you?

A No.

Q In fact, you had no signs of contusions or abrasions; isn't that true?

A Yes.

Q And you never told the doctor that Neil hurt your arm by pulling it up behind you, did you?

MR. SOLOMON: I'm going to object to that, your Honor.

THE COURT: Why?

MR. SOLOMON: Because he's talking about a patient's medical history. I can't bring that out when I have it. How can counsel bring it up when it may not even be

asked. There's no indication she was even asked. All she has to do is indicate to the doctor what happened to her, what the general nature of the complaint it. The Court has seen her. She's been here already for an hour and a half, and she went in to be treated by a doctor at that time. Was she going to go through this and explain detail by detail what happened?

MR. GOODMAN: Just a second. I think counsel is making a speech.

THE COURT: You don't know that she was asked it, Counsel.

Q Do you remember the doctor examining you to see if there were any contusions or abrasions?

You know what a contusion or an abrasion is?

MR. SOLOMON: I'm going to object.

THE WITNESS: Yes.

MR. SOLOMON: I'm going to object. He asked this question. He read from a report.

THE COURT: You objected before there was any answer to it. If she remembers it.

Does she remember being examined, or do you remember being asked even.

Q Do you remember the doctor asking you whether there were--did you sustain, did you get any bruises or injuries? Do you remember the doctor asking you about that? A Yes.

THE COURT: Counselor, what difference does it make? She's already indicated to you she did not have any scratches or bruises. That was the first question you asked, and she said, no. So why would she be telling the doctor is she didn't have any of these?

MR. GOODMAN: I'm saying now, did you tell the doctor that the man hurt your arm by pushing it behind your back? That's the only reason.

Q Marjorie, let me put it a different way.

You never told your doctor that you hurt your arm that night, did you?

A The doctor that had checked my arm for me.

Q And there was no soreness there, right?

A Well, it was still hurting from that time. Can I go to the bathroom?

SHERIFF'S OFFICER: Judge, excuse us for a moment.

THE COURT: Okay.

MR. SOLOMON: Your Honor, this can be off the

record.

THE COURT: Yes.

(Discussion off the record.)

(A recess is taken.)

MARJORIE JONES, previously sworn, resumes the stand and testifies further as follows:

CROSS EXAMINATION (Continued)

BY MR. GOODMAN:

Q Besides the people in the hospital, did you tell anybody else that your left arm--excuse me--that your right arm got hurt that night?

A No.

Q You didn't? A No.

Q Do you remember telling Policewoman Most that when your arm was twisted, that it was your left arm and not your right arm?

Do you remember telling that to Mrs. Most?

A I don't remember. I remember telling her my right arm because this is the arm that was hurt and not my left arm.

Q So that if she has in her report that it was your left arm, that's a mistake?

MR. SOLOMON: Same objection as before.

THE WITNESS: Yes.

THE COURT: How does she know it was a mistake if it's in her report?

MR. GOODMAN: If it is, your Honor.

Q You never told Mrs. Most that it was your left arm, right? A No.

Q And when you were talking to Mrs. Most, did you demonstrate, did you show her which arm it was?

A I told her that it was my right arm.

Q You told her it was your right arm?

A Yes.

Q All right.

Do you remember telling Police Officer Talarico that you went to two taverns in Passaic?

A No. I told him three.

Q You told him three?

A Yes.

Q All right.

You told the Judge and the lawyer before that you sat down on a chair right next to the bed; is that right? A Yes.

Q Do you remember telling Officer Talarico that you were sitting on a chair in another room when Neil called you, and that you refused to go to him?

A Say that again.

Q Do you remember telling Officer Talarico, or maybe Officer D'Amelio, two police officers, Badge Numbers 272 and 77, do you remember talking to those two policemen after this incident happened?

A I know I talked to two policemen, but I don't know what their names are.

Q Do you remember telling them that Neil was on the bed and that you were seated on a chair in another room and you refused to go into the room where Neil was?

A No. I didn't tell him that.

Q You didn't tell him that?

A No.

Q All right.

Did you tell the police officers that when you refused to go to the room where he was, that he came and he pulled you into the room from the other room?

A No, I didn't tell him that neither.

Q You never told him that?

A No.

Q Okay.

Do you remember who was working in the store when you got back to the store after you left Park Avenue?

MR. SOLOMON: I'm going to object, your Honor.

THE COURT: She never told us that she went back to the store, Counselor.

MR. SOLOMON: She indicated she never went back.

THE COURT: You've asked it at least fifteen times, Counselor. She told you she returned, got out of the truck and went into her house.

You have asked her how many times she went into the store, and she has denied it every time, Counselor.

MR. GOODMAN: Let's see if it's right.

THE COURT: She has not yet testified that when she got out of that truck that she went into the store.

Q All right.

Marjorie, when you got out of the truck, after you came back from Park Avenue, did you go right into your house, or did you stay by the store?

A Well, when I got out of the truck my boyfriend, my baby's father, was in front of like between my house and the store, and I stood right there and I was talking to him, and I went in the house.

Q While you were talking to your boyfriend, that's who

you said he is, right?

A Yes.

Q Did you look into the store to see who was working in there on that night?

A No.

Q You couldn't see?

A No.

Q Did you see at any time that night Evelyn Page in the store? A Evelyn Page?

Q Yes. A I don't know her.

Q You don't know her at all?

A No. Maybe if I see her I might know her. But I don't know her by name.

Q By the way, how far is the apartment on Park Avenue from the store?

A I don't know.

Q Would you say that you can get from the Park Avenue apartment to the store in about three minutes?

A No.

Q More or less? A More.

Q Well, don't you just have to drive down Park Avenue over to Straight Street, over the bridge?

A Well, I never been on Park Avenue and I didn't know whether I know my way from there to home or not.

Q But it's very short, isn't it, Marjorie?

THE COURT: Compared to what, Counselor?

All right. We'll take a break. No objection from counsel, but you got an objection from me on that question.

MR. GOODMAN: All right.

THE COURT: All right.

Take her in the other room for another couple of minutes.

Gentlemen, this girl has had a series of breakdowns during court and she's been on the stand for two hours now. It's now almost ten minutes to four. I think this might be a good time to recess--

MR. GOODMAN: All right.

THE COURT: (Continuing) And continue with cross examination tomorrow morning.

It will be, Mr. Goodman, at least eleven o'clock.

MR. GOODMAN: Starting at eleven. You have other things?

THE COURT: Yes, Wednesday morning.

MR. SOLOMON: Thank you, your Honor.

THE COURT: We didn't put on the record an order of sequestration was requested by the Prosecutor and

entered.

Mr. Goodman, I'm just putting on the record that earlier, and I don't think we did put it on the record, the Prosecutor asked for an order of sequestration, and that order was entered.

MR. GOODMAN: All right.

MR. SOLOMON: Thank you, your Honor.

MR. GOODMAN: Can we explain that to the witness as to what sequestration is?

MR. SOLOMON: That's what I'm doing now.

(Whereupon, the hearing is adjourned until Wednesday, March 14th, 1979, at 11:00 A.M.)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CRIMINAL

THE STATE OF NEW JERSEY

v. CERTIFICATE

NEIL MORRISON,
Defendant.

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I, Rocco M. Emma, Official Court Reporter, do certify the foregoing to be a true and accurate transcript of my original stenographic notes taken in the above matter to the best of my knowledge and ability.

s/R.M.E.

Date: September 24, 1979

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
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No. 84-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY and JOHN P. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,

Petitioners,

-vs-

NEIL MORRISON,

Respondent.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Stone v. Powell* bars a claim of ineffective assistance of counsel on *habeas corpus* review, where the alleged Sixth Amendment violation is grounded solely in counsel's failure to move to suppress evidence allegedly seized in violation of applicant's Fourth Amendment rights.

2. Whether a Fourth Amendment claim which is barred under *Wainwright v. Sykes* may be asserted in a federal *habeas corpus* action in order to determine whether a Sixth Amendment violation has occurred.

3. Whether the fact findings of a state judge concerning the weight he accorded evidence in a bench trial are entitled to the presumption of correctness under 28 U.S.C. sec. 2254(d).

PARTIES TO THE PROCEEDINGS BELOW

The captioned parties were the parties before the United States Court of Appeals for the Third Circuit.

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No. 84-1661
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF NEW JERSEY, and JOHN P. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON,
Petitioners,

-vs-

NEIL MORRISON,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, affirming respondent's convictions is appended to the Appendix to the petition for certiorari at Pa12. The order of the New Jersey Supreme Court denying respondent's petition for certification is appended at the Appendix to the petition for certiorari at Pa15. The opinions of the United States District Court and the United States Court of Appeals for the Third Circuit are reported: *Morrison v. Kimmelman*, 579 F.Supp. 796 (D.N.J. 1981), vac. and rem., 752 F.2d 918 (3d Cir. 1985), reh. den. ___ F.2d ___ (3d Cir. 1985), and are appended at petitioners' appendix Pa1 and Pa18.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 18, 1985. A timely petition for rehearing *en banc* was denied on February 19, 1985, and this petition was filed within sixty (60) days of that date pursuant to Rule 20.1 and 20.4, Rules of the Supreme Court. The Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. sec. 1254(1) with *certiorari* to the United States Court of Appeals for the Third Circuit having been granted on October 8, 1985.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Code, Title 28, section 2254(d)

In any proceeding instituted in a Federal court by an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondents shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisidiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

New Jersey Court Rule 3:5-7

(a) Notice; Time. On notice to the prosecutor of the county in which the matter is pending or threatened, to the applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may

be used against him in a penal proceeding, may apply to the Superior Court only and in the county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within a jurisdiction of the municipal court. Such motion shall be made within 30 days after the initial plea to the charge unless the court, for good cause shown, enlarges the time. A motion made before the trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

. . .

(f) Consequences of Failure to Move. If a timely motion is not made in accordance with this rule, the defendant shall be deemed to have waived any objection during trial to the admission of evidence on the ground that such evidence was unlawfully obtained.

New Jersey Court Rule 3:22-1

Any person convicted of a crime may, pursuant to this rule, file with the county clerk of the county in which the conviction took place a petition for post-conviction relief captioned in the action in which the conviction was entered.

New Jersey Court Rule 3:22-5

A prior adjudication upon the merits of any ground for relief is conclusive whether made in the proceedings resulting in the conviction or in any post-conviction proceeding brought pursuant to this rule or prior to the adoption thereof, or in any appeal taken from such proceedings.

STATEMENT OF THE CASE

Respondent owned a fish store and employed the victim, 15 year old Marjorie Jones, after school hours. (1T19-7 to 1T22-7).[1] On the night of October 13, 1977, respondent took the victim with him while he made several deliveries. (1T23-14 to 1T29-19). Thereafter respondent took the victim to his apartment. After several visitors departed, respondent asked the victim to join him on the bed. (1T33-4 to 1T38-14). She refused. He forced her to submit by twisting her arm. (1T38-16 to 1T39-19). He also muffled her screams for help by placing his hand over her mouth. (1T40-4 to 6). Respondent pushed the victim's jeans and underpants down, inserted his penis in her vagina and completed an act of sexual intercourse. (1T40-7 to 1T41-7). Respondent then drove the victim back to his place of business which was next door to the victim's home. (1T41-19 to 1T42-13).

The victim's mother was alerted by her daughter's unusual behavior. (2T17-2 to 25). After a few questions, the victim informed her mother that respondent had forcibly induced her to have sexual intercourse. (2T18-2 to 9; 2T20-3 to 10).

Police were immediately summoned. (2T20-11 to 25). The girl's mother reported the crime and gave the girl's underpants

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[1] 1T refers to the trial transcript of March 13, 1979.
2T refers to the trial transcript of March 14, 1979.
3T refers to the trial transcript of March 15, 1979.
4T refers to the trial transcript of March 16, 1979.
5T refers to the trial transcript of March 19, 1979.
6T refers to the trial transcript of March 20, 1979.
ST refers to the sentencing transcript of June 7, 1979.
MT refers to the motion transcript of August 3, 1979.
PCR refers to the hearing transcript of July 24, 1982.
HT refers to the *habeas* hearing transcript of December 20, 1983.
Aa refers to petitioners' appendix filed with the court of appeals.
Sa refers to petitioners' supplemental appendix filed with the court of appeals.
Pa refers to petitioners' appendix filed with the petition for *certiorari* with this Court.

to the police for laboratory analysis. (2T24-4 to 24). The victim was transported to the hospital where she was medically examined. (2T31-3 to 25).

Shortly thereafter, just hours after the rape, the victim led the police officers to the scene of the crime, respondent's apartment. (2T99-17 to 22). Detective Dolores Most knocked on the door but there was no answer. (2T100-2 to 7). At that point, a neighbor appeared and verified that the apartment belonged to the respondent. The neighbor opened the unlocked door and the police officers went inside. (2T100-8 to 19). The police found no one inside the apartment. Detective Most seized a bedsheet from respondent's bed. (2T102-23 to 2T103-1).

Laboratory tests were conducted on the bedsheet which had been seized from respondent's apartment, and the victim's underpants which were independently obtained from the victim. Both the bedsheet and the underpants contained seminal stains which tested positive for blood group O, the same blood group as that of respondent. (3T129-4 to 8; 4T23-23 to 4T24-20; 4T75-7 to 13; 4T77-19 to 22; 4T78-20 to 24). In addition, head hairs found on the bedsheet were found to compare morphologically with samples taken from respondent and from the victim. (4T153-21 to 25). Finally, tests on vaginal samples of the victim performed at the hospital showed the presence of sperm. (4T26-7 to 25; 4T28-21 to 25).

On March 14, 1978, respondent was charged in Passaic County Indictment No. 369-78 with carnal abuse, contrary to the provisions of N.J. Stat. Ann. 2A:138-1 (West 1969) (Count One); rape, contrary to the provisions of N.J. Stat. Ann. 2A:138-1 (West 1969) (Count Two); impairing the morals of a minor, contrary to the provisions of N.J. Stat. Ann. 2A:96-3 (West 1969) (Count Three); and private lewdness, contrary to the provisions of N.J. Stat. Ann. 2A:115-1 (West 1969) (Count Four). A bench trial was conducted before the Honorable William J. Marchese, J.S.C., between March 13 and 20, 1979. Defense counsel moved to suppress evidence seized from

respondent's apartment during trial. This motion was denied. The court ruled that the motion was procedurally barred for failure to file timely prior to trial pursuant to N.J. Ct. R. 3:5-7(f). (2T103-2 to 3; 2T110-20 to 22; 2T115-18 to 19). On March 20, 1979, respondent was adjudged guilty on all counts. One June 7, 1979, respondent was sentenced to an eight to ten year term of imprisonment for rape. He also received concurrent terms of six to eight years for carnal abuse, two to three years for impairing the morals of a minor and one to two years for private lewdness.

On July 24, 1979, respondent filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division.

On August 3, 1979, respondent moved before the Honorable William J. Marchese, J.S.C., for bail pending appeal. This motion was denied. (MT16-6 to 19). The court ruled in this regard that the claim of an illegal search was not a substantial issue for appellate review which would be likely to cause reversal of the convictions. The judge specifically found that the evidence from the bedsheet seized from respondent's apartment "was just one small phase in this whole case." (MT11-14 to 15; Aa33).

Respondent raised the following issues to the Appellate Division: the convictions should be merged, ineffective assistance of counsel, and the trial court erred in refusing to permit a suppression motion during trial.

On March 18, 1981, the Appellate Division affirmed respondent's conviction for rape, finding that trial counsel was competent and that the trial court correctly refused to permit the suppression motion at trial. The court merged the remaining three charges into the rape conviction.

Respondent thereafter filed a Petition for Certification to the Supreme Court of New Jersey, claiming ineffective assistance of counsel. On May 18, 1981, the Supreme Court of New Jersey denied the petition. (Pa15).

On July 29, 1982, respondent sought post-conviction relief

in the Superior Court of New Jersey, Law Division, pursuant to N.J. Ct. R. 3:22-1, raising the same issues as had been raised on direct appeal. Such relief was denied on procedural grounds, as all issues had been raised on direct appeal. N.J. Ct. R. 3:22-5. (PCR50-16 to 21).

On April 27, 1983, respondent filed a petition for a writ of *habeas corpus*, raising claims of ineffective assistance of counsel and the erroneous admission of illegally seized evidence at trial. On June 13, 1983, petitioners filed a motion to dismiss the petition. On December 20, 1983, a hearing on the petition and motion to dismiss the petition was held before the Honorable Herbert J. Stern, U.S.D.J. Judge Stern denied the motion to dismiss the petition. (Aa75).

On January 30, 1984, Judge Stern ordered that unless the State of New Jersey began proceedings to retry respondent within 90 days of the order, a writ of *habeas corpus* would issue, releasing Neil Morrison from all restraints and custody of the State of New Jersey in connection with the rape conviction of March 20, 1979. (Aa82). The order was based upon the district court's finding that respondent's trial counsel was ineffective and that respondent had been prejudiced by this error. (Pa 31). Respondent's Fourth Amendment claim was ruled to be precluded from review by *Stone v. Powell*, 428 U.S. 465 (1976).

Petitioners filed a Notice of Appeal from the order dated January 30, 1984, to the Court of Appeals for the Third Circuit. On February 21, 1984, petitioners filed a Notice of Motion for a stay of the order dated January 30, 1984, pending determination of the appeal by the Third Circuit. This motion was granted on March 20, 1984. (Aa84).

On January 18, 1985, the court of appeals rejected petitioners' contention that because respondent's Sixth Amendment claim was based on counsel's alleged failure to advance a Fourth Amendment claim, he was barred from federal collateral review by *Stone v. Powell*, 428 U.S. 465 (1976). *Morrison v. Kimmelman*, 752 F.2d 918, 922 (3d Cir. 1985). The court further found that the trial attorney's representation fell below

an objective standard of reasonableness. *Morrison v. Kimmelman, supra.* However, the court of appeals remanded to the district court for a determination of whether there was a reasonable probability that the result would have been different absent counsel's error, under the standard formulated in *Strickland v. Washington,* 466 U.S. ___, 104 S.Ct. 2052 (1984). The court noted that this new standard had been announced after the district court filed its opinion. *Morrison v. Kimmelman,* 752 F.2d at 923. The court further held, without explanation, that the State trial judge's factual determination at the bail motion hearing that his verdict was not affected by the allegedly illegally seized evidence is not a finding to which the presumption of correctness must be accorded under 28 U.S.C. sec. 2254(d). Id. at 923 n.2.

On January 30, 1985, petitioners filed a petition for rehearing and rehearing *en banc* to the court of appeals on that portion of the court's ruling that the presumption of correctness, 28 U.S.C. sec. 2254(d), should not be accorded to the trial court's finding regarding the lack of prejudice to respondent from the alleged error, and requesting that the court state its reason for this ruling so that the determination could be reviewed. The court denied this petition on February 19, 1985. (Pa 39).

The Third Circuit's judgment vacating the district court order and remanding to ensure compliance with *Strickland v. Washington,* 466 U.S. ___, 104 S.Ct. 2052 (1984) was entered on January 18, 1985. (Pa41). On February 27, 1985, the circuit court issued a mandate remanding the case to the district court. (Id). On March 22, 1985, the court of appeals granted petitioners' motion to recall the mandate and stay further issuance of the mandate pending application for *certiorari.* (Pa40).

This court granted *certiorari* on October 8, 1985.

SUMMARY OF ARGUMENT

1. *Stone v. Powell,* 428 U.S. 465 (1976), bars litigation of a Sixth Amendment claim which is based on counsel's failure to advance an available Fourth Amendment claim. Where litigation of the claim of ineffective assistance of counsel requires reaching the merits of a Fourth Amendment claim, permitting *habeas* relief based on the Sixth Amendment issue will permit such broad circumvention of the *Stone* doctrine as to endanger its future application. Where the alleged prejudice to a defendant is solely that seized evidence would have been excluded had counsel been effective, the values protected by the Sixth Amendment are not affected. Trustworthy evidence is excluded, however, contrary to the determination of this Court that such a result cannot be justified by the minimal deterrent effect on illegal searches from the invocation of the exclusionary rule on federal *habeas corpus* review.

2. A Fourth Amendment claim which is barred under *Wainwright v. Sykes,* 433 U.S. 72 (1977), may not be asserted in a federal habeas corpus action in order to determine whether a Sixth Amendment violation has occurred. Litigation of the merits of the procedurally barred claim to provide a basis for a claim of ineffective assistance of counsel permits circumvention of the procedural bar.

3. The finding of a state trial judge, made at a hearing subsequent to a trial in which he sat as a finder of fact, that a challenged item of evidence did not significantly affect his verdict was entitled to the presumption of correctness under 28 U.S.C. sec. 2254(d). The court of appeals' refusal to defer to this finding of fact without any stated reasons, violates the mandate of this Court and of the Congress in enacting 28 U.S.C. sec. 2254(d). The trial judge, who sat as fact-finder in the bench trial, is in the best position to know the basis for his own verdict. The lack of deference to his finding in this regard severely undermines the comity concerns underlying 28 U.S.C. sec. 2254(d) and cannot be countenanced.

LEGAL ARGUMENT

POINT I

REVIEW OF RESPONDENT'S CONTENTION IS BARRED BY BOTH *STONE V. POWELL*[2] AND *WAINRIGHT V. SYKES*.[3]

The respondent in the present case is in the novel position of having joined two traditional bars to *habeas corpus* relief together in such a way as to gain relief. As will be developed more fully below, respondent failed to raise a Fourth Amendment claim in the manner prescribed by New Jersey procedure and failed to show good cause for this default. His true assertion is that one piece of evidence which he claims was illegally seized was introduced against him at his trial. Viewed as a Fourth Amendment claim, this issue would be immune from *habeas corpus* review under *Stone v. Powell*, 428 U.S. 465 (1976). The issue would also be barred under the doctrine set forth in *Wainwright v. Sykes*, 433 U.S. 72 (1977), since the state courts refused to review the issue based on the state procedural default. Respondent has deftly attempted to avoid both of these bars by joining them together and presenting his complaint in Sixth Amendment terms. His position defies the old adage that two wrongs do not make a right. Of course, any *habeas* applicant whose lawyer fails to move for suppression or who presents a suppression motion which is denied could charge ineffectiveness of counsel. Similarly, whenever a procedural default occurs, he can blame his attorney. Permitting such tactics to succeed, however, renders nugatory the rules which this Court and Congress have set forth to promote finality of criminal litigation and ensure comity between the state and federal systems.

A. *Stone v. Powell* Precludes a Federal *Habeas* Court From Reviewing a Claim of Ineffective Assistance of Counsel Grounded in a Fourth Amendment Violation.

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2 *Stone v. Powell*, 428 U.S. 465 (1976).

3 *Wainwright v. Sykes*, 433 U.S. 72 (1977).

At respondent's state trial, defense counsel failed to timely move to suppress physical evidence even though New Jersey law provided him with a full and fair opportunity to make such a motion. N.J. Ct. R. 3:5-7. At the conclusion of the bench trial, respondent was convicted of various sexual crimes and that conviction was affirmed on appeal. Respondent sought and was granted federal *habeas* relief on the ground that his trial counsel was incompetent in failing to move to suppress that evidence, thereby securing federal review of the challenged search. Petitioners submit that the federal courts were barred from reviewing respondent's claim because it was based upon a violation of the Fourth Amendment. To permit a state court prisoner to successfully seek federal review of a search simply by couching the claim in terms of Sixth Amendment incompetency of counsel contravenes the intent of this Court's express holding in *Stone v. Powell, supra* and renders that holding a nullity.

Underlying the opinion in *Stone v. Powell, supra*, is the recognition that the sole purpose of the exclusionary rule is the deterrence of illegal police conduct, 428 U.S. at 492; *United States v. Leon*, 468 U.S.___, 104 S.Ct. 3405, 3412 (1984), and the rule was never intended to nor can it "cure the invasion" of the suspect's rights. 428 U.S. at 540 (White, J., dissenting). This judicially created remedy operates to safeguard Fourth Amendment rights generally and is not a personal constitutional right of the person aggrieved. *United States v. Leon*, 468 U.S. at ___, 104 S.Ct. at 3412, citing *United States v. Calandra*, 414 U.S. 338, 348 (1974).

While this Court has continued to uphold the validity of the exclusionary rule, see generally *United States v. Leon, supra*, nevertheless, it has recognized the societal costs implicated in a mechanical application of the rule. These costs include unwarranted acquittals of guilty defendants, impairment of the truth-finding functions of judge and jury and a general disrespect for the law and the administration of justice. Id. at ___, 104 S.Ct. at 3413. See also *United States v. Payner*, 447 U.S. 727,

734 (1980). Limitations upon application of the exclusionary rule are merely a recognition that "it is the defendant, and not the constable, who stands trial." Id. For these reasons, the exclusionary rule has not been deemed applicable to grand jury proceedings, see *United States v. Calandra*, *supra*, nor to civil proceedings, *United States v. Janis*, 438 U.S. 433 (1976), and just last term this Court ruled that evidence seized by law enforcement officers in good faith reliance upon a judicially issued warrant will not be suppressed. *United States v. Leon*, *supra*; *Massachusetts v. Sheppard*, ___ U.S. ___, 104 S.Ct. 3424 (1984). These cases underscore this Court's unwillingness to expand the scope of the exclusionary rule beyond its stated purpose, *i.e.*, to "discourage law enforcement officers from violating the Fourth Amendment by removing the incentive to disregard it." *Stone v. Powell*, 428 U.S. at 492.

Whatever benefits may accrue from enforcement of the exclusionary rule at trial and on direct appeal simply disappear when the claim of illegal search and seizure is raised on collateral review. At that point, defendant's search and seizure claim has already been rejected by several levels of the state court system. To allow a federal court to overturn such a conviction when innocence of the defendant is not at issue exacts too great a societal cost without any corresponding demonstration that deterrence of unlawful activity could be fostered by reversing on *habeas corpus* review a search deemed to be proper in the state courts. See *Stone v. Powell*, 428 U.S. at 491-493. Given this fact, this Court has determined that where the State has provided an opportunity for full and fair litigation of the Fourth Amendment claim, a state prisoner may not be granted federal *habeas corpus* relief on the ground that illegally seized evidence was admitted into evidence at his trial. Id. at 494.

In the aftermath of *Stone v. Powell*, *supra*, it is beyond dispute that Fourth Amendment claims are not cognizable on *habeas corpus* review so long as the State has provided a defendant with an opportunity to challenge the introduction of physical evidence at trial. *Habeas corpus* review is precluded so long

as an opportunity to litigate the Fourth Amendment claim is provided by the State and actual recourse to the courts is irrelevant for purpose of this bar. *Gates v. Henderson*, 568 F.2d 830, 837 (2d Cir. 1977) (*en banc*), *cert.* den. 434 U.S. 1038 (1978); *Graves v. Estelle*, 556 F.2d 743, 746 (5th Cir. 1977); *United States ex rel. Carbone v. Manson*, 447 F.Supp. 611, 616 (D. Conn. 1978).

As a necessary and logical extension of the *Stone v. Powell* doctrine, several courts of appeal have declined to review federal *habeas* claims that, although alleging a violation of other constitutional rights, are in essence challenging the propriety of a search and seizure. See *Abell v. Raines*, 640 F.2d 1085 (9th Cir. 1981) (First Amendment violation); *LiPuma v. Comm'r., Dept. of Corrections*, 560 F.2d 84 (2d Cir. 1977), *cert.* den. 434 U.S. 861 (1977) (Sixth Amendment violation). The Fourth Circuit has taken a contrary view, *Sallie v. North Carolina*, 587 F.2d 636, 640-641 (4th Cir. 1978), *cert.* den. 441 U.S. 911 (1978), holding that nothing in *Stone v. Powell* precluded a federal court from issuing a writ based upon a counsel's failure to move for suppression.[4] The circuit court below refused to apply *Stone v. Powell* to bar consideration of such claims absent a clear mandate from this Court. *Morrison v. Kimmelman*, 752 F.2d 918, 920-922 (3d Cir. 1985). Petitioners submit that the purpose of the exclusionary rule and the principles of federalism proscribe federal intervention when a constitutional claim is predicated upon review of the validity of a search and that this bar may not be circumvented by using another constitutional amendment to camouflage what is truly a Fourth Amendment claim.

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[4] The Eighth, Fifth and Ninth Circuits have specifically declined to decide whether *Stone v. Powell* precludes federal examination of a Sixth Amendment claim grounded in a Fourth Amendment violation. *Ryder v. Morris*, 752 F.2d 327, 330-331 (8th Cir. 1985); *Christian v. McKaskle*, 731 F.2d 1196, 1199 (5th Cir. 1984); *Satchell v. Cardwell*, 653 F.2d 408, 409 n.6 (9th Cir. 1981), *cert.* den. 454 U.S. 1154 (1982). *Raines*, a Ninth Circuit case, involved a First Amendment claim grounded in a Fourth Amendment violation.

In *LiPuma*, the accused's state trial counsel failed to make a timely motion to suppress. When trial counsel attempted to make such a motion during trial, the trial court denied the motion because, at the time, the pertinent statute[5] precluded mid-trial consideration of the motion. LiPuma was eventually convicted of the charge and his post-trial motion for a new trial based upon incompetency of counsel for failure to file a timely suppression motion was denied. The conviction was subsequently affirmed by the Appellate Division and the New York Court of Appeals denied leave to appeal. Id. at 87-88.

LiPuma subsequently filed a petition for *habeas corpus* relief based upon counsel's incompetency. The district court granted the writ after determining that counsel was derelict in failing to file a suppression motion which would not "have been of obvious futility." Id. at 88. The Second Circuit Court of Appeals reversed, holding that counsel was not incompetent and that, since the suppression issue was fully considered by New York state courts, the case was governed by *Stone v. Powell*. Id., 560 F.2d at 93. The fact that LiPuma couched his claim in Sixth Amendment terms was properly deemed irrelevant by the court:

> The fact that petitioner's claim is ostensibly grounded on the Sixth, rather than the Fourth Amendment does not negate *Stone's* applicability, because at the heart of this case lies an alleged Fourth Amendment violation.
>
> * * *
>
> The same remedy of exclusion is now sought by way of collateral habeas corpus proceeding, where a Sixth Amendment claim has been added for good measure. [Id. at 93 n.6].

Thus, the circuit court refused to allow LiPuma to circumvent

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[5] N.Y. Crim. Proc. L. sec. 710.40 (McKinney 1984).

the bar of *Stone v. Powell* simply by alleging a violation of some other constitutional right where the underlying objection concerned a search and seizure.

Similarly, in *Abell v. Raines*, a state prisoner convicted in an Arizona state court of possession of obscene materials unsuccessfully sought federal *habeas corpus* relief by alleging a First Amendment violation. Abell contended that the search warrant utilized for the seizure of the obscene materials was constitutionally deficient because it gave unlimited discretion to the seizing police officer to choose those photographs he deemed obscene. Id., 640 F.2d at 1086. The Ninth Circuit affirmed dismissal of the petition, noting that, "although we recognize that First Amendment values are at stake, appellant's allegation that evidence admitted against him should have been suppressed is a *Fourth* Amendment claim, rather than a First." Id. at 1087 (emphasis in original). Similar attempts by state prisoners to seek federal review of searches and seizures by couching their claims in terms of the Fifth Amendment's right against self-incrimination have been rejected on the basis of *Stone v. Powell*. See *Reiff v. Dept. of Corrections*, 474 F.Supp. 276, 279 (E.D.N.Y. 1979) (confession "induced" by search); *United States ex rel. Carbone v. Manson*, 447 F.Supp. at 617 (receipt's admission into evidence violated right against self-incrimination).

What these courts have recognized is that whenever a federal *habeas* claim is grounded in the Fourth Amendment, no matter how that claim is captioned, review is precluded by *Stone v. Powell*. To hold otherwise would totally emasculate *Powell* and permit federal judges to engage in a *de novo* review of the state court proceedings and determine, often from an incomplete record, whether a suppression motion would have been successful.

This outcome is particularly possible when the alleged constitutional violation involves a Sixth Amendment claim. As this Court has recognized, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction

or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland v. Washington*, 466 U.S. ___, 104 S.Ct. 2052, 2065 (1984). The willingness of federal courts to provide a forum for claims which would otherwise be barred by *Stone v. Powell* can only encourage the proliferation of ineffectiveness of counsel claims and prolong the criminal process indefinitely. Id. at ___, 104 S.Ct. at 2066.

By the simple expedient of challenging trial counsel's competency in failing to make a motion, state prisoners will be able to flaunt this Court's specific injunction against relitigation of Fourth Amendment claims and make a mockery of the concept of finality of judgments. As Judge Chapman noted with dismay in his concurring opinion in *Sallie v. North Carolina*,

> For the past decade Federal Courts have been inundated by an ever increasing stream of habeas corpus petitions from state prisoners.... The present opinion has the effect of sweeping aside *Stone*, since petitioners may now simply allege that counsel was incompetent in not raising the search and seizure issue at the state trial.... Every unhappy prisoner now has a new ground to attack his conviction. Every writ writer in the five states comprising the Fourth Circuit will be ordering paper to begin this assault. [587 F.2d at 641-642 (Chapman, J., concurring)].

Perhaps the most disturbing facet of this issue involves the type of "fact finding" which a federal district court must indulge in to adjudicate a state prisoner's claim. Because a suppression hearing was never held at the state level, a decision regarding the propriety of the search was unnecessary. On federal *habeas* review, the State will be faced with a Hobson's choice regarding its response to the applicant's Fourth Amendment claim. The State could concede the impropriety

of the search, thereby providing support for the petitioner's claim that counsel was incompetent and permitting a district court to decide the validity of the search from the record before it. Conversely, should the State contest petitioner's illegal search claim, a hearing would be required on the issue. *Townsend v. Sain*, 372 U.S. 293, 310, 319 (1963). Under the guise of a hearing to resolve the incompetency of counsel claim, a federal court would be adjudicating the propriety of a search and seizure. This result would totally contravene the rationale of *Stone v. Powell, supra*, and further strain the relationship between the state and federal systems.

If procedures of this type are allowed to develop, the legacy of *Stone v. Powell* will be an increase in the workload of judges reviewing federal *habeas corpus* petitions rather than the decrease which was to be expected. Prior to the *Stone v. Powell* decision, a federal judge reviewing an alleged Fourth Amendment violation which formed the basis of a state court conviction would be required, at most, to conduct a hearing concerning the legality of the search itself. If the approach taken in the present case is countenanced, however, it will first be necessary to determine whether counsel's actions were actually ineffective -- a process which may itself require a hearing. After the process is complete, the court will be required to hold a further hearing in order to decide whether the Fourth Amendment was violated since only in this way would it be possible to determine whether there was prejudice resulting from the ineffectiveness. Such an increase in workload could not have been envisioned when this Court drafted the *Stone v. Powell* opinion and certainly can do little to foster comity between the state and federal systems.

In the instant case, such an untenable result occurred. In the district court, Judge Stern reviewed the sparse record and determined that a suppression motion would have been successful. *Morrison v. Kimmelman*, 579 F.Supp. 796, 802-803 (D.N.J. 1984). However, because a suppression motion was never held below, the State was never obligated to demonstrate

the validity of the search. Now, years after the fact, a federal district court examined that admittedly sparse record and determined *as a matter of fact* that suppression would have been granted had a motion been made and on that basis granted a writ reversing a conviction. Such an absurd result, which allows a defendant to circumvent *Stone v. Powell's* strict admonition against relitigation of search and seizure issues, simply cannot be tolerated. More importantly, the friction between state and federal systems of justice can only increase, as state officials regard with dismay the reversal of criminal convictions and release of numerous prisoners based upon, in effect, a seemingly improper re-evaluation of the legality of a search by a federal district court judge. Such actions can only foster rancor, cynicism and disrespect for the criminal justice system in society and constitute an undeserved windfall for criminal defendants.

For these reasons, petitioners respectfully urge this Court to preclude federal *habeas* review of the instant constitutional claim grounded in a Fourth Amendment violation.

B. Respondent Failed To Show Cause and Prejudice To Excuse the State Procedural Default.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court established a definitive standard to determine when a *habeas* applicant's state procedural default should bar federal *habeas* review. Absent a showing by the applicant of cause for the default and actual prejudice from the error, principles of comity, federalism and judicial efficiency prevent federal courts from granting *habeas* relief on constitutional claims not reviewed in the state courts due to the default. Id. at 90-91.

Respondent alleged a violation of his Sixth Amendment right to effective assistance of counsel, in that his attorney failed to timely file a motion to suppress evidence in accordance with N.J. Ct. R. 3:5-7(a) and (f). At bottom, this case actually deals with a *Sykes* procedural default involving an otherwise

competent counsel's failure to timely raise a substantive Fourth Amendment claim, rather than a Sixth Amendment violation.

The court of appeals improperly examined this procedural forfeiture as a claim of ineffective representation of counsel, governed by *Strickland v. Washington*, 466 U.S. ___, 104 S.Ct. 2052 (1984).[6] If the court of appeals were affirmed, a *habeas* applicant who could not legitimately demonstrate cause and prejudice could nonetheless escape the consequences of *Wainwright v. Sykes* by merely alleging ineffectiveness of counsel, a result that virtually destroys the procedural default rule and its underlying policy considerations. Therefore, petitioners urge this Court to rule that *Sykes* and its progeny govern *habeas* proceedings that allege a Sixth Amendment violation to excuse a state procedural forfeiture of an underlying Fourth Amendment claim.

Sound policy reasons support uniform application of the *Sykes* standard in procedural default cases where a facial Sixth Amendment claim has been proffered. The cause and prejudice rule of *Wainwright v. Sykes* was established, in part, to minimize the potentially burdensome costs of generous *habeas* review. Collateral review of a conviction extends the ordeal of trial for both society and the accused, undermines the finality of litigation and often impedes society's right to punish admitted offenders. *Engle v. Isaac*, 456 U.S. 107, 126-127 (1982). These costs are particularly high when a prisoner seeks *habeas* relief following a state procedural default, because the trial court had no opportunity to correct the defect and avoid problematic retrials. Id. at 128. Moreover, uniform application of the cause and prejudice standard would prevent lower federal courts from circumventing *Wainwright v. Sykes* by applying Sixth Amendment standards in clear procedural default cases.

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[6] The court of appeals failed to address petitioners' argument, raised in its brief to that court, that the procedural default doctrine barred *habeas* relief under *Wainwright v. Sykes*, *supra*.

Most federal courts refuse to allow *habeas* applicants to raise forfeited state claims anew under the guise of the Sixth Amendment, because that would eliminate altogether any need for a showing of cause. See *Long v. McKeen*, 722 F.2d 286, 288-289 (6th Cir. 1983), *cert.* den. ___ U.S. ___, 104 S.Ct. 1608 (1984); *Jones v. Jago*, 701 F.2d 45, 47-48 (6th Cir. 1983), *cert.* den. ___ U.S. ___, 104 S.Ct. 273 (1983); *Marks v. Estelle*, 691 F.2d 730, 734-735 (5th Cir. 1982), *cert.* den. 462 U.S. 1120 (1983) (citing *Lumpkin v. Ricketts*, 551 F.2d 680, 683 (5th Cir. 1977), *cert.* den. 434 U.S. 957 (1977)). However, the decisions of the district court and court of appeals in this case exemplify how some courts inappropriately bypass *Wainwright v. Sykes* by reviewing an obvious procedural default as a Sixth Amendment violation.[7] In fact, the thrust of respondent's argument is that his trial counsel's inadvertence or ignorance in failing to file a timely suppression motion satisfied the cause prong to justify the default. Establishing a uniform rule in procedural default cases would compel the lower courts to probe beneath the surface of an alleged Sixth Amendment claim to ascertain whether the applicant met the burden of demonstrating cause and prejudice for the state forfeiture.[8]

This Court never intended that a single attorney error resulting in procedural default would give lower courts a license to replace the *Sykes* test with a Sixth Amendment inquiry. As *Engle v. Isaac* explains, the Constitution guarantees only a fair trial

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[7] The court of appeals indicated that counsel's failure to conduct discovery was part of the basis for the ineffective assistance of counsel claim. (Pa3). The basis of respondent's claim is not counsel's failure to obtain discovery. Respondent accused trial counsel of doing only one thing wrong: he failed to obtain the benefit of the Fourth Amendment exclusionary rule for respondent. The performance of counsel was otherwise not attacked and it has never been suggested that defense counsel's discovery practices affected the trial in any other way.

[8] A *habeas* court's consideration of a mere allegation of ineffectiveness of counsel similarly would undermine this Court's rule against reviewing alleged errors when the applicant failed to exhaust state remedies. See *Rose v. Lundy*, 450 U.S. 910 (1982).

and a competent attorney, and does not mandate that trial counsel will recognize and raise every cognizable constitutional error. Id., 456 U.S. at 134. Just as the *Sykes* standard governed counsel's single failure in *Isaac* to comply with Ohio's rule mandating contemporaneous objections to jury instructions, so too should it apply here where a single oversight by otherwise competent counsel leads to procedural forfeiture of a Fourth Amendment claim.

Furthermore, *habeas* applicants gain the undeserved benefit of a lesser burden of proving prejudice if the federal *habeas* court assesses the default under a Sixth Amendment analysis rather than the *Sykes* cause and prejudice standard. Unlike the requisite showing under *Sykes* that the asserted errors actually and substantially disadvantaged the *habeas* applicant, *United States v. Frady*, 456 U.S. 152, 170 (1982), to win federal collateral relief on a substantive Sixth Amendment claim, a defendant need only show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. at ___, 104 S.Ct. at 2065, 2068. Also, no showing of a "colorable claim of innocence" is required under a Sixth Amendment inquiry. *United States v. Frady*, 456 U.S. at 171-172. The court of appeals in the instant case undoubtedly would have reached a different conclusion had it applied the more stringent prejudice component enunciated in *Frady* governing procedural default cases. See generally *Antone v. Strickland*, 706 F.2d 1534, 1541-1543 (11th Cir. 1983) (Kravitch, J., concurring) *cert.* den. ___ U.S. ___, 104 S.Ct. 511 (1983), reh. den. ___ U.S. ___, 104 Ct. 750 (1984).

In sum, the court of appeals established an untenable precedent that enables *habeas* applicants to avoid operation of the *Sykes* rule by merely alleging ineffective representation of counsel, a result this Court could not have intended. Accordingly, to succeed in his *habeas* petition, respondent must demonstrate cause and actual prejudice to surmount his state procedural forfeiture. Petitioners submit that respondent has

failed to demonstrate good cause for his failure to timely move to suppress the bedsheet seized from his apartment. N.J. Ct. R. 3:5-7(a) and (f). Nor has he shown that the error actually prejudiced him, resulting in a fundamental miscarriage of justice. *United States v. Frady*, 456 U.S. at 172.

1. Respondent Failed to Prove Cause for the State Procedural Default.

Few areas of criminal procedure have created as much uncertainty in the last decade as defining the cause and prejudice test to obtain federal review for a state procedural forfeiture.[9] Nevertheless, this Court's *habeas* rulings directly link the cause inquiry to defense counsel's conduct, and to whether counsel reasonably could have asserted the legal error. *Wainwright v. Sykes*, 433 U.S. at 91 n.14; id. at 92-93 (Burger, C.J., concurring). Thus, when trial counsel knows, should have known or reasonably could have known of the alleged constitutional defect, but fails to timely raise the challenge, *habeas* relief will be denied for lack of cause. Id. at 96 (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. at 131. Guided by this standard, petitioners submit that respondent's totally unexcused noncompliance with a well-established state procedural rule fails to constitute sufficient cause to excuse the default.

[9] *Wainwright v. Sykes* seems to require that a federal *habeas* court first must make a threshold determination whether the state procedural rule relied upon by the state court in declining to decide the merits of the federal constitutional claim is independent of the federal question and adequate. Id., 433 U.S. at 78-79, 81-82. Both the district court and the Third Circuit found that respondent had failed to timely file a motion to suppress the evidence before the trial, as required by N.J. Ct. R. 3:5-7(a) and (f), and that this procedural default barred review of respondent's Fourth Amendment challenge under *Stone v. Powell*, 428 U.S. 465 (1976). Implicit in these findings is the conclusion that N.J. Ct. R. 3:5-7(a) and (f) constitute an independent and adequate state ground to preclude federal *habeas* review on the merits of the federal constitutional question unless respondent satisfies the cause and prejudice standard.

The notion of reasonably excusable conduct by trial counsel defining the cause component has emerged in a series of *habeas* cases. *Sykes* reserved for future cases giving precise meaning to the cause and prejudice standard, except to indicate that such terms should be construed to prevent miscarriages of justice. *Wainwright v. Sykes*, 433 U.S. at 87, 91. However, in a footnote, the Court favorably referred to Justice Powell's concurring opinion in *Estelle v. Williams*, 425 U.S. 501, 513 (1976), proposing an "inexcusasble procedural default" test to bar availability of federal *habeas* review where contested substantive rights could have been preserved if a trial objection had been raised in a timely manner. 433 U.S. at 89 n.13. See Goodman & Sallett, "*Wainwright v. Sykes*: The Lower Federal Courts Respond," 30 *Hastings L.J.* 1683, 1714-1718 (1979).

In *Isaac*, this Court held that a defendant failed to show cause when he possessed the tools to construct a constitutional claim, and the basis of the claim was available and other defense counsel had perceived and litigated the claim but he did not. *Engle v. Isaac*, 456 U.S. at 134. A defendant's constitutional guarantees of a fair trial and competent counsel do not insure that defense counsel will recognize and raise every cognizable constitutional claim. Id. Emphasizing that cause and prejudice take their meaning from the significant state interests at stake in *habeas* proceedings, this Court ruled that considerations of comity and finality counsel against alleging mere unawareness of a defect as cause for a procedural default. Id. These principles apply whether counsel's default stemmed from simple ignorance or other reasons, so that the distinction between inadvertent and strategic counsel decisions is not a critical factor in the cause inquiry. Id. at 129 n.34.[10]

[10] The cause requirement may be satisfied, however, when a constitutional claim is so novel that its legal basis is not reasonably available to counsel. *Reed v. Ross*, ____ U.S. ____, 104 S.Ct. 2901, 2910 (1984).

The equation of cause with reasonably excusable error by counsel also is implicit in Justice Brennan's discussion in *Reed v. Ross*, ___ U.S. ___, 104 S.Ct. 2901, 2911 (1984), that a novel claim will not sufficiently establish cause if counsel had a reasonable opportunity to assert the claim. See Marcus, "Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice," 53 *Fordham L. Rev.* 663, 722 (1985). Petitioners urge that it is against this standard of reasonably excusable error which respondent must establish cause to justify his procedural default.[11] We believe this standard will advance a state's interests in finality of judgment, comity, judicial economy and protecting the integrity of state trials, as well as protect the defendant's interest in securing release from unjust incarceration in appropriate cases. *Engle v. Isaac*, 456 U.S. at 135.

The federal circuits that have addressed the cause issue since *Isaac* and *Ross* consistently have assessed the reasonableness of counsel's conduct, and almost uniformly have held that counsel's unawareness of a claim due to inadvertence or negligence cannot excuse a procedural default.[12]

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11 This Court has recently embraced a standard of objective reasonableness in a variety of other contexts. See *United States v. Leon*, 468 U.S. ___, 104 S.Ct. 3405 (1984) (evidence seized pursuant to a search warrant, subsequently found to be unsupported by probable cause, should not be suppressed where the officers reasonably relied on validity of the warrant); *Strickland v. Washington*, 466 U.S. ___, 104 S.Ct. 2052 (1984) (to establish a violation of the Sixth Amendment guarantee of effective assistance of counsel, a defendant must show that counsel's performance was deficient, in that representation fell below an objective standard of reasonableness).

12 See, *Tsirizotakis v. LeFevre*, 736 F.2d 57, 62 (2d Cir. 1984), *cert.* den. ___ U.S. ___, 105 S.Ct. 216 (1984) (assertions of counsel errors that do not amount to ineffectiveness of counsel under the Sixth Amendment do not constitute cause under *Sykes*); *Marks v. Estelle*, 691 F.2d 730, 735 (5th Cir. 1982), *cert.* den. 462 U.S. 1120-1121 (1983) (counsel's failure to investigate and discover certain inadmissible evidence does not constitute legitimate cause); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983), *cert.* den. ___ U.S. ___, 104

Petitioners contend that respondent's failure to timely raise the search and seizure claim in accordance with New Jersey's suppression rule did not constitute cause as contemplated by this Court. Respondent has offered no reasonable explanation for his non-compliance with the rule, *Wainwright v. Sykes*, 433 U.S. at 91-92, other than to speculatively conclude in his *habeas* petition that the failure to file the motion was attributable to ineffective assistance of counsel. Trial counsel clearly had the

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12 cont'd

S.Ct. 1608 (1984) (*Isaac* instructs that attorney incompetence in failing to raise a claim or counsel's ignorance of the law or a mistake in judgment is not cause); *Williams v. Nix*, 751 F.2d 956, 962 (8th Cir. 1985) *cert.* den. ___ U.S. ___, 105 S.Ct. 2681 (1985) (counsel's unawareness of a claim involving a jury instruction does not constitute cause under *Isaac*); *Runnels v. Hess*, 713 F.2d 596, 600 (10th Cir. 1983) (counsel's failure to object to the prosecutor's remarks did not constitute cause under *Isaac*. This ruling superseded the court's pre-*Isaac* decision in the same case, 653 F.2d 1359 (10th Cir. 1981)); *Palmes v. Wainwright*, 725 F.2d 1511, 1525 (11th Cir. 1984), *cert.* den. ___ U.S. ___, 105 S.Ct. 227 (1984) (counsel ignorance of the facts is not cause under *Sykes*); *Middleton v. Cupp*, 768 F.2d 1083, 1087 (9th Cir. 1985) (when a state procedural rule is reasonably discernible by competent counsel, an unintentional procedural failure does not amount to cause under *Isaac*).

The sole exception to this line of cases is *Carrier v. Hutto*, 724 F.2d 396 (4th Cir. 1983), aff'd 754 F.2d 520 (4th Cir. 1984) (*en banc*), *cert.* granted *Sielaff v. Carrier*, ___ U.S. ___, 105 S.Ct. 3523 (1985), in which the Fourth Circuit held that a single act or omission by counsel, short of a Sixth Amendment violation, nonetheless may satisfy the cause test in *Sykes*. The Fourth Circuit's reasoning in *Carrier* is flawed in several respects. The holding is totally irreconcilable with *Isaac's* admonition that mere allegation of inadvertence is not cause. *Carrier* also failed to assess the reasonableness of trial counsel's failure to appeal the trial court's denial of his request for evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *Carrier v. Hutto*, 724 F.2d at 399-400. Finally, the Fourth Circuit relied heavily on pre-*Isaac* cases that distinguished between unintentional and strategic attorney errors, a distinction this Court did not consider noteworthy in the cause inquiry in *Isaac*. *Engle v. Isaac*, 456 U.S. at 129 n.34.

tools to recognize the factual basis of the illegal search claim. *Engle v. Isaac*, 456 U.S. at 133. A month before the outset of the trial, counsel received a report documenting that hairs removed from the bedsheet were similar to head hairs of both respondent and the victim. (2T108-23 to 2T109-16). Counsel apparently had considerable criminal law experience, and therefore it can be presumed that he either knew or should have known of the time limitations set forth in New Jersey's long-standing motion to suppress rule. Whether the failure to raise the alleged error arose from counsel's unawareness that the police had seized the sheet or an oversight is immaterial to the cause inquiry under *Engle v. Isaac*. It is indisputable that information concerning the sheet was readily available before trial, so that counsel reasonably should have or could have discovered it and filed the appropriate pretrial suppression motion. *Engle v. Isaac*, 456 U.S. at 134.

Moreover, New Jersey's compelling interests in enforcing the time requirements of its suppression rule would be gravely undercut if the court of appeals were affirmed. Id. at 135 (cause and prejudice take their meaning from principles of comity and federalism). This rule promotes the community's interests in judicial economy, and the interests of all litigants in the courts by promptly disposing of Fourth Amendment evidential questions before the trial's start. See *Ford v. Israel*, 534 F.Supp. 1128, 1138 (W.D. Wis. 1982). Recognizing that the rule preserves the orderly administration of criminal justice, the New Jersey Supreme Court repeatedly has held that a defendant's non-compliance with N.J. Ct. R. 3:5-7 results in a waiver of the right to challenge the legality of a search or the inadmissibility of seized evidence at trial. *State v. Martin*, 87 N.J. 561, 566-567, 436 A.2d 96, 99 (1981); *State v. DiRienzo*, 53 N.J. 360, 384, 251 A.2d 99, 112 (1969); *State v. Broxton*, 49 N.J. 373, 388, 230 A.2d 489, 497 (1967).

In sum, respondent has failed to offer a sufficiently reasonable explanation for his procedural default. *Long v. McKeen*, 722 F.2d at 289; *Marks v. Estelle*, 691 F.2d at 734-735. Since

respondent therefore has not demonstrated cause under *Wainwright v. Sykes*, this Court should vacate the Third Circuit's holding addressing the merits of the *habeas* application.

2. Respondent Suffered No Actual Prejudice From The Alleged Constitutional Error.

Habeas applicants bear the formidable burden of proving "actual prejudice" from the constitutional defect, independent of a showing of cause, in order to collaterally attack a conviction following a state procedural forfeiture. *Wainwright v. Sykes*, 433 U.S. at 87, 90-91. Both the district court and the Third Circuit neglected to address the prejudice issue in the context of the *Sykes* procedural default standard. Petitioners submit that respondent failed to sufficiently show actual prejudice resulting from the admission of the bedsheet into evidence and thus his procedural default bars collateral relief.

This Court decisively has indicated that, due to the enhanced state interests in preserving the finality of criminal judgments from collateral attacks, the burden of showing prejudice is greater than that required to show harmless error or plain error on direct appeal. *United States v. Frady*, 456 U.S. at 165-166. Unlike the harmless error doctrine, *Chapman v. California*, 386 U.S. 18 (1967), *Sykes* shifts the burden of proving prejudice from the State to the *habeas* applicant, who must show that the alleged trial resulted in actual and substantial disadvantage, infecting the entire proceeding with error of constitutional dimension. More than the possibility of prejudice must be shown. *United States v. Frady*, 456 U.S. at 170. The degree of prejudice stemming from the error must be evaluated under the totality of circumstances at trial. Id. at 169.

Furthermore, the *habeas* applicant must present affirmative evidence--a colorable claim--that he is innocent. Id. at 171-172. This construction of prejudice harkens to Justice Black's observation that the availability of collateral relief should depend on whether the constitutional claim raised "casts some shadow of

a doubt'' on the prisoner's guilt. *Kaufman v. United States*, 394 U.S. 217, 242 (1969) (Black, J., dissenting).[13] In short, respondent must convincingly show that a) the factfinder actually would have ruled differently had the bedsheet been suppressed, and b) that he was factually innocent of the charges.

Respondent has not demonstrated that ''actual prejudice'' resulted from his counsel's failure to make a timely motion to suppress the bedsheet evidence. As reflected in the state trial judge's findings of fact, the bedsheet evidence had no impact on his determination of respondent's guilt. The state trial judge viewed credibility as the critical issue in the case and found the victim's story believable. (6T85-24 to 6T92-2). Moreover, medical evidence which was adduced at trial proved conclusively that the victim had in fact had a sexual experience on the night of the rape. (4T26-7 to 25; 4T28-21 to 25). The challenged evidence, seminal stains and hairs found on the bedsheet, shed little, if any, light on the issue of respondent's guilt. That seminal stains were found on respondent's own bedsheet is not surprising. Likewise, the evidence of hairs on the bedsheet similar to that of the victim is of no consequence. The experts who testified at trial specifically concluded that a person cannot be identified by his hair.

Moreover, respondent's objection regarding the introduction of the bedsheet evidence is based upon alleged improper police conduct. The reason advanced for excluding the evidence does

[13] Following Justice Black's dissent, Judge Henry J. Friendly advanced the view that, but for some exceptions, ''convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.'' Friendly, ''Is Innocence Relevant? Collateral Attack on Criminal Judgments,'' 38 *U. Chi. L. Rev.* 142 (1970). Expounding on the meaning of the phrase, Judge Friendly indicated that the *habeas* applicant must show ''a fair probability that, in light of all the evidence ... the trier of facts would have entertained a reasonable doubt of guilt.'' Id. at 160. Considering the historical foundation of the term, the petitioners submit that a colorable claim of innocence properly can be construed as a reasonable showing of innocence.

not bear on respondent's guilt or innocence but rather solely concerns deterring illegal police conduct.

Since respondent has made no showing of ''actual prejudice'' and has not presented a ''colorable claim of innocence,'' he was improperly granted relief in the district court.

3. Respondent Failed To Show That He Was Deprived of Effective Assistance of Counsel.

Even if the court of appeals properly employed a Sixth Amendment analysis, petitioners submit that respondent nevertheless failed to show that trial counsel's single omission was professionally unreasonable or probably would have changed the result of the case. *Strickland v. Washington*, 466 U.S. at ___, 104 S.Ct. at 2064. Turning initially to the prejudice component, respondent must show that the alleged error adversely affected the defense, considering the totality of evidence. Id. at ___ , 104 S.Ct. at 2069. It is not enough to show that the error conceivably influenced the outcome. Id. at ___ , 104 S.Ct. at 2067-2068.[14]

Petitioners submit that respondent's *habeas* petition does not even suggest how his attorney's failure to seek suppression of the bedsheet would have altered the outcome of this case. *Nutall v. Greer*, 764 F.2d 462, 466 (7th Cir. 1985). The record unequivocally shows that the evidence derived from the bedsheet had no bearing on the trial court's guilty verdicts. The trial court treated credibility as the central controlling issue. It assessed the testimony of key witnesses, and found the victim's version believable. That the bedsheet had no impact on the determination of guilt is evidenced by the absence of any reference to the bedsheet in the trial judge's factual findings. Medical evidence confirmed that the victim had a sexual encounter on the night of the offense. This evidence,

[14] Since the court of appeals indicated that the prejudice standard applied by the district court was no longer valid, this Court should independently decide if respondent has met his burden of demonstrating prejudice.

coupled with the victim's description of respondent's attack and corroborative "fresh complaint" testimony of other prosecution witnesses, furnished overwhelming evidence of guilt. *Tsirizotakis v. LeFevre*, 736 F.2d 57, 63-64 (2d Cir. 1984), *cert.* den. ___ U.S. ___ , 105 S.Ct. 216 (1984).

Considering the trial court's profile of this case, the failure to suppress the bedsheet created no reasonable likelihood of a different result, and could not have undermined confidence in the guilty verdicts.

Respondent also failed to satisfy the performance component of the *Strickland* test, which requires a showing that trial counsel's assistance fell below an objective standard of reasonably professional representation. *Strickland v. Washington*, 466 U.S. at ___ , 104 S.Ct. at 2064. Judicial review of an attorney's performance must be highly deferential, and the defendant must overcome the presumption that counsel rendered adequate assistance. Id. at ___ , 104 S.Ct. at 2065-2066. The challenged acts or omissions must be examined in the context of the total trial circumstances to determine if counsel's representation produced a reliable adversarial testing process. Id. at ___ , 104 S.Ct. at 2066.

Applying these principles, petitioners submit that respondent has not overcome the strong presumption of competent assistance. The record amply reflects that trial counsel crafted a sound trial strategy, based on impeaching the victim's credibility.[15] Carrying out this plan, counsel vigorously cross-examined the victim and other prosecution witnesses, highlighted numerous inconsistencies in their testimony, tried to show that the victim had an ulterior motive for bringing charges against respondent and marshaled numerous defense witnesses to support respondent's claim of innocence. Viewed in its entirety, counsel's pretrial investigation, preparation and trial performance were professionally reasonable, considering

[15] Neither the district court nor the court of appeals examined defense counsel's alleged error in the context of the defense strategy to relentlessly attack the credibility of the victim.

that the case turned on the credibility of witnesses, and that the bedsheet had minimal probative value. *Strickland v. Washington*, 466 U.S. at ___ , 104 S.Ct. at 2066-2067.[16]

Since respondent failed to establish that he was deprived of effective representation of counsel, this Court should vacate the ruling of the court of appeals and dismiss respondent's *habeas* petition.[17]

[16] This Court has recognized that an egregious error or omission may support a claim of ineffective assistance of counsel. *United States v. Cronic*, 466 U.S. ___ , 104 S.Ct. 2039, 2046 n.20 (1984). However, the mere failure to file a timely suppression motion, alone, does not *per se* amount to a Sixth Amendment violation. See *Christian v. McKaskle*, 731 F.2d 1196, 1199 (5th Cir. 1984); *Nettles v. Wainwright*, 677 F.2d 410, 413 (5th Cir. 1982); *United States v. Reincke*, 341 F.2d 977, 981 (2d Cir. 1965).

[17] Petitioners note that in *Evitts v. Lucey*, ___ U.S. ___ , 105 S.Ct. 830 (1985), this Court intimated that on appeal, state courts should attempt to enforce procedural rules by penalizing the errant attorney rather than the defendant. Id. at ___ , 105 S.Ct. at 837-838. This rule applied to post-trial procedural rules which clearly are of less urgency and involve lesser societal costs than rules relating to procedures before or at trial. *Engle v. Isaac*, 456 U.S. at 127-128; *Wainwright v. Sykes*, 433 U.S. at 91-93 (Burger, C.J., concurring). For example, the failure simply to appeal, unlike a failure to raise a *Miranda* objection at trial or to file a suppression motion before trial, does not require additional fact-finding by the *habeas* court. Also, whereas the procedural rule in *Lucey* promoted only the State's interest in finality, New Jersey's suppression rule benefits both parties by expeditiously resolving Fourth Amendment issues so that the defense can chart a sound strategy in advance of trial, and by clarifying and settling important questions relating to admissibility of evidence at the trial. The rule thus is conducive to the orderly administration of justice for all litigants. See *Henry v. Mississippi*, 379 U.S. 443, 448-449 (1965).

The Court in *Lucey* narrowly framed the issue in that case as whether the appellate-level right to counsel also includes the right to effective assistance of counsel. *Evitts v. Lucey*, ___ U.S. at ___ , 105 S.Ct. at 834. It made no reference to the procedural default rules enunciated in *Engle v. Isaac* and *Wainwright v. Sykes*, and did not

17 cont'd

in any way indicate that the procedural default rule should be changed. It is noted, however, that there appears to be a conflict between the broad statement in *Lucey* that a criminal defendant should not be penalized for his counsel's failure to abide by state procedural rules and the long-held principles that noncompliance with state procedural rules, such as the contemporaneous objection rule, bars federal *habeas* relief. See *Wainwright v. Sykes, supra; Francis v. Henderson*, 425 U.S. 536 (1976).

POINT II

A STATE COURT'S FINDING THAT CHALLENGED EVIDENCE DID NOT AFFECT THE RESULT IN A BENCH TRIAL IS ENTITLED TO DEFERENCE BY THE FEDERAL COURTS.

The circuit court of appeals erroneously failed to give deference to a fact-finding by the state trial judge concerning the weight which was given to an item of evidence following a bench trial. Instead, the court merely stated that this fact-finding was not entitled to the presumption of correctness. Required fact-findings were made by the state trial judge at a bail motion heard shortly after respondent's bench trial. Petitioners assert that the finding made by the state trial judge at the bail motion, that the evidence which respondent believes should have been suppressed, had no impact on the verdict is entitled to the presumption of correctness under 28 U.S.C. sec. 2254(d). The district court, while acknowledging that state court fact-findings are entitled to the presumption of correctness under 28 U.S.C. sec. 2254(d), refused to apply the presumption in this case. *Morrison v. Kimmelman*, 579 F.Supp. 796, 804 (D.N.J. 1984), vac. and rem., 752 F.2d 918 (3d Cir. 1985). The Third Circuit also ruled that the trial court's factual determinations were not to be accorded deference. *Morrison v. Kimmelman*, 752 F.2d at 923 n.2.

In this case, respondent elected to forego a jury trial on an indictment charging him with carnal abuse, rape, impairing the morals of a minor and private lewdness. A bench trial was thus conducted between March 13 and 20, 1979, before the Honorable William J. Marchese, J.S.C. During trial, defense counsel moved to suppress evidence of a bedsheet that was taken by the police from respondent's apartment. (1T102-23 to 1T103-1). The trial judge denied the motion on procedural grounds. N.J. Ct. R. 3:5-7(f). On March 20, 1979, the trial judge, before announcing his verdict, set forth his factual findings. See N.J. Ct. R. 1:7-4. The trial judge reviewed the

testimony of the victim and her mother in addition to the testimony of the defense witnesses. He found some inconsistencies in the victim's story but concluded that they were of minor significance. The judge found the defense witnesses' testimony to be mostly inconsistent and some of it wholly incredible. Based on his evaluation of the credibility of the witnesses, the trial judge found respondent guilty on all counts. (6T85-24 to 6T92-16). At the time the judge rendered his decision, he focused solely on the testimony of the witnesses and did not consider any of the physical evidence.

Subsequent to his conviction and sentencing, respondent moved before Judge Marchese for bail pending appeal. In New Jersey, bail after conviction is appropriate only where a substantial issue for review exists and where the defendant poses no threat to the community. N.J. Ct. R. 2:9-4. Respondent argued that the trial judge's decision to deny his motion to suppress the bedsheet constituted a substantial question for appeal. The trial judge, in denying respondent's application, determined that:

> Obviously, the most important phases of the case were direct testimony from the victim herself as well as from testimony of witnesses, police, medical examinations, and testimony from the defense, testimony by the defendant. The sheet was just one small phase in this whole case. (MT11-10 to 15).

The state trial court determined that the alleged error was not a substantial issue for appeal because the evidence in question was "just one small phase" of the trial. Thus, the state court made a specific factual finding, after a hearing on this issue in which both parties were present, that its verdict was independent of the challenged evidence. This was a specific factual finding required to be made at a hearing on the merits of an issue and was thus clearly entitled to the presumption of correctness.

Thereafter, respondent appealed his conviction. His conviction was affirmed by the Superior Court of New Jersey,

Appellate Division and his petition for certification to the New Jersey Supreme Court was denied, demonstrating the correctness of the trial court's finding that the challenge to the suppression ruling was meritless.

Subsequently, respondent petitioned the federal district court for *habeas corpus* relief on grounds that his untimely motion to suppress was improperly denied and he was denied effective assistance of counsel based upon his counsel's failure to make a timely motion for suppression. The district court granted respondent's petition. *Morrison v. Kimmelman, supra.* In its written opinion, the court recognized that a federal court must give deference to state court findings of fact in a federal *habeas* proceeding. 579 F.Supp. at 804. The court, nonetheless, refused to give deference to either the state trial judge's findings at the time of the verdict or the factual determinations he made at the bail hearing. Id. In fact, in its written opinion, the district court only referred to the findings made at the time the verdict was returned. With respect to these findings, the district court commented that "there is no basis for concluding in this situation that the findings made by the state trial judge represented the complete factual underpinnings for his ultimate finding of guilt."[18] Id. Thus, he did not accord these findings deference. The district court totally ignored the findings made by the trial judge at the bail motion. However, in its observations at the *habeas* hearing, it expressed its belief that the trial court was biased and as a result did not make accurate

[18] Before announcing his verdict, the trial judge stated, "I think you are entitled to some of my observations before I give you the bottom line." (6T86-4 to 5). The district court seized upon the use of the word "observations" and found that this characterization by the trial judge regarding his findings was conclusive proof that the judge's determinations were not "factual findings." 579 F.Supp. at 804. The trial judge's use of the word "observations" instead of "findings" certainly does not change the fact that the trial judge was setting forth his fact-findings. See N.J. Ct. R. 1:7-4. Moreover, however characterized, the judge's statements clearly reflected his "findings" in the case.

findings. The district court stated:

> I know what a trial judge is worried about. They're worried about Courts of Appeals. It isn't hard to fathom that the trial judge certainly knew that the one hairy thing in the case was the evidence...that the police just...took away without a warrant. And him saying on the record that didn't play a role in his decision...I don't know that that is worth much .... [HT14-13 to 21].

On appeal from the district court, the court of appeals, referring to the state trial court's finding that "the sheet was just one small phase in this whole case," simply stated, in a footnote, without further explanation, that the state court's finding "is not a finding to which a presumption of correctness must be accorded under 28 U.S.C. sec. 2254(d)." *Morrison v. Kimmelman*, 752 F.2d at 923 n.2. The court of appeals refused to cite an exception justifying this ruling when requested to do so in a petition for rehearing.

Petitioners contend that contrary to the ruling of the court of appeals, the finding made by the state trial judge at the bail motion following the trial regarding the importance of the evidence of the bedsheet is a "fact-finding" entitled to deference under 28 U.S.C. sec. 2254(d). Thus, as this finding was made after a hearing on the merits of a factual issue and is supported by the record, it is entitled to deference.

28 U.S.C. sec. 2254(d) provides that "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction ... shall be presumed correct" unless the applicant establishes that the "factual determination is not fairly supported in the record."[19] The reason for according

[19] 28 U.S.C. sec. 2254(d) also sets forth the following exceptions where the applicant establishes or the respondent admits:

(1) that the merits of the factual dispute were not resolved in the State court hearing;

deference and applying the presumption to state court factual determinations is grounded in notions of comity and federalism. Indeed, in *Sumner v. Mata*, 449 U.S. 539 (1981) (*Sumner v. Mata I*), on reh. 455 U.S. 591 (1982) (*Sumner v. Mata II*), this Court emphasized the importance of subsection (d) as follows:

> A writ issued at the behest of a petitioner under 28 U.S.C. Sec. 2254 is in effect overturning either the factual or legal conclusions reached by the state court system under the judgment of which the petitioner stands convicted, and friction is a likely result.... [I]t is clear that in adopting the 1966 amendments, Congress in sec. 2254(d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in sec. 2254(d) was found to exist by the federal habeas court ... or unless the habeas court concludes that the ... state court determination is not "fairly supported by the record"....[449 U.S. at 550].

[19] cont'd

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding.

Issues of fact have been defined as basic, primary or historical facts: facts in the sense of recital of external events and credibility of their narrators. *Cuyler v. Sullivan*, 446 U.S. 333, 341 (1980); *Townsend v. Sain*, 372 U.S. 293, 310 n.6 (1963). Recently, this Court has taken a very expansive view as to what kinds of facts are included in those entitled to deference under 28 U.S.C. sec. 2254(d). The Third Circuit's narrow construction of the term "fact" is inconsistent with these recent opinions. The state trial judge's findings were certainly of the type of factual determinations entitled to deference.

In *Rushen v. Spain*, ___ U.S. ___, 104 S.Ct. 453 (1983), reh. den. ___ U.S. ___, 104 S.Ct. 1336 (1983), this Court held that the substance of *ex parte* communications between a state trial judge and a juror and their effect on juror impartiality are questions of historical fact entitled to the presumption of correctness under 28 U.S.C. sec. 2254(d). Id. at ___, 104 S.Ct. at 456. See also *Wainwright v. Goode*, ___ U.S. ___, 104 S.Ct. 378 (1983). Thus, this Court accorded deference to the state trial judge's determination that the *ex parte* communications between himself and the juror "lacked any significance" with respect to whether the defendant suffered prejudice therefrom, because it concluded that the state court was in a far better position than the federal court to determine whether jury deliberations, as a whole, were not biased. *Rushen v. Spain*, ___ U.S. at ___, 104 S.Ct. at 456. Similarly, in *Maggio v. Fulford*, 462 U.S. 111, 103 S.Ct. 2261 (1983), this Court held that the court of appeals erroneously substituted its own judgment in place of that of the state court's in a case where the state court determined that an accused was competent to stand trial. This Court held that the weight attributed by the state trial court to the unannounced, last minute nature of the defendant's motion for an appointment of a competency commission was entitled to due respect. Id. at ___, 103 S.Ct. at 2264. Part of the trial judge's determination was based upon his opinion that the untimely motion was made as a "subterfuge" to forestall going to trial. Id. at ___, 103 S.Ct. at 2263. Deference was warranted because the trial judge was in the best position to evaluate the genuine

nature of the request and then to determine the significance the request played in terms of the entire trial.

This Court has also held that a state trial court's determination regarding juror partiality is an "historical fact" entitled to the presumption of correctness. *Wainwright v. Witt*, ___ U.S. ___, 105 S.Ct. 844 (1985); *Patton v. Yount*, ___ U.S. ___, 104 S.Ct. 2885 (1984); *Smith v. Phillips*, 455 U.S. 209 (1982). In reaching this conclusion, this Court has focused on a state trial judge's unique ability to evaluate credibility and demeanor and has concluded that this ability is entitled to "special deference." *Patton v. Yount*, ___ U.S. at ___, 104 S.Ct. at 1893. This Court has recognized that a state trial court's basis for credibility findings cannot be easily discerned from an appellate record. *Wainwright v. Witt*, ___ *U.S. at* ___, *105 S.Ct. at 855.* Finally, this Court has held that due respect should be given to inferences which are drawn from the facts by the state courts. *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843 (1983); see also *Culombe v. Connecticut*, 367 U.S. 568, 605 (1961).

As can be seen from a review of the foregoing cases, questions involving what weight to accord evidence, credibility determinations and inferences to be drawn from the facts are all considered "factual" determinations entitled to the presumption of correctness under sec. 2254(d). The common thread running through all of these opinions is the conclusion that the state court is in a unique position to make these determinations and, thus, these determinations are entitled to due respect. As this Court observed in *Marshall v. Lonberger*, *supra:*

> As was aptly stated by the New York Court of Appeals although in a case of a rather different substantive nature: "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertain-

> ing the truth.... How can we say the judge is wrong? We never saw the witnesses... To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." [459 U.S. at ___ , 103 S.Ct. at 851 (citations omitted)]

The lower courts in the case at bar failed to pay heed to this admonition and thereby erred.

In the present case, the state trial judge's determination that the evidence of the bedsheet was of minor significance when considering the case as a whole is no different than the state court's determination in *Rushen* that an *ex parte* communication between the state trial court and a juror "lacked any significance" with respect to jury deliberations. In both cases, the state trial judge made findings regarding the significance a particular event had on the outcome of the case. In *Rushen*, the state trial judge was obviously in the best position to evaluate the significance of a conversation to which he was a party. His assessment was, therefore, not second-guessed.

So, too, in the case at bar, the state trial judge was in the best position to attest to what significance, if any, was attached to certain evidence admitted at a trial in which he sat as the fact-finder.[20] Clearly, there is no basis for doubting the state trial judge's determination that the bedsheet evidence played a very minor role, if any, in his final decision as to respondent's guilt. The trial judge was presented with all of the evidence. He carefully reviewed that evidence in the context of the entire trial. He was obviously in the best position to determine the significance of the role a particular piece of evidence played during trial, based upon that review

[20] Admittedly this would be a much harder case had respondent been convicted following a jury trial. Even in that case, however, the trial judge who had the opportunity to view the presentation of the evidence and the demeanor of the witnesses is in a much better position to judge the impact of certain items of evidence than a federal court which can only speculate on a cold record.

and evaluation. Moreover, to now attempt to re-evaluate one piece of evidence and determine its role in reaching a conclusion of guilt would be impossible without the benefit of understanding its context as exposed through the live trial.

Additionally, petitioners submit that credibility determinations are akin to determinations regarding the significance of evidence. Both involve assessments of what is presented and conclusions regarding how much weight should be attributed to that evidence. When a witness testifies at a trial, he or she offers evidence which must be evaluated in order to determine what weight it will be given. The trier of fact observes the demeanor of the witness and reviews the testimony in light of all the surrounding circumstances to determine if it is consistent and credible. The testimony is itself evidence which may or may not play a significant role in drawing a picture that depicts the subject event. When a judge, sitting as a fact-finder, is presented with tangible evidence at trial, he must also determine what role, if any, that evidence plays in reaching a determination of guilt. He does this by evaluating and assessing the particular evidence in the context of all the evidence presented. It is this determination of the significance of the particular piece of evidence that is the same as the judge's determination regarding credibility. The process of that determination and the basis therefore cannot be easily discerned from an appellate record. The trier of fact who sees and hears the evidence as it is presented is in the best position to decide how important that evidence is in the overall scheme of the trial.

Despite the recent holdings of this Court and their applicability to this case, the district court totally ignored and, in fact, discredited the state court findings. This utter lack of deference for the state court's findings undermined the principles of comity and ignored the means by which Congress has chosen to resolve a great source of conflict in our federal system. Surely, the state trial judge who sat as a fact-finder is in the best position to know the basis for his own verdict. The state court must be given due respect, and it must be presumed that the court gave an

honest appraisal of the evidence before it. When a trial court, sitting as fact-finder, indicates that its decision was predicated upon admissible evidence, it will rebut any allegation that the court relied upon incompetent evidence. *State v. Antone*, 62 Haw. 346, 615 P.2d 101, 107 (1980). Indeed, in the present case, the record contains no evidence rebutting the presumption that the trial judge disregarded the bedsheet evidence in reaching his verdict. Id. at ___ , 615 P.2d at 108. Cf. *State v. Warren*, 124 Ariz. 396, 604 P.2d 660, 666 (Ct. App. 1979); *State v. Williams*, 387 A.2d 17, 30 (Me. 1978); *People v. Payne*, 37 Mich. App. 442, 194 N.W.2d 906, 908 (1972).

Moreover, it is difficult to imagine a situation in which deference is more appropriate than that in which the judge's fact-finding is based purely on a knowledge and evaluation of his own mental processes. For a federal court to rule that a state judge has not correctly evaluated his own thoughts and does not know the reasons underlying his own verdict is certainly not in keeping with the intent of sec. 2254(d).[21] Thus, deference is clearly mandated in this case.

Finally, petitioners submit that the state trial judge's conclusion that he considered the evidence of the bedsheet to be of little significance is fairly supported by the record. 28 U.S.C. sec. 2254(d) (8). A review of the record as a whole makes abundantly clear that the major issue in the case was one of credibility of the witnesses. Both defense counsel and the prosecutor stressed this in their summations. (6T27-6 to 9; 6T44-5 to 12). In point of fact, the prosecutor noted that the

[21] The district court's further inference that the trial judge manufactured his fact-findings in an attempt to mislead the appellate courts of New Jersey also disregards the concerns for comity which underlie section 2254(d), is erroneous and is not be be sanctioned. Section 2254(d) was designed for the explicit purpose of preventing federal courts from second-guessing and doubting the reliability of results in state courts. The district court's allegations regarding the sincerity of the state trial judge's findings are thus shocking and certainly not to be countenanced.

only issue that both parties agreed on was that the case turned on the credibility of the witnesses. (6T44-5 to 12). When the trial judge announced his findings at the conclusion of the case, he reviewed all of the testimony in detail, except for that of the experts who testified regarding the physical evidence. (6T85-24 to 6T92-16). Indeed, the trial judge never mentioned any of the physical evidence in the case and only made a brief reference to it at the time of the bail hearing. Obviously, then, he did not view this evidence as critical to his determination of guilt.

Without regard to the evidence emanating from the bedsheet, overwhelming evidence of guilt existed. Marjorie Jones, a fifteen year old girl at the time of the rape, testified in detail regarding the brutal attack by respondent. (1T38-10 to 1T41-11). Apart from the testimony of the victim, fresh complaint testimony was adduced from the victim's mother, two police officers and an investigator. (2T20-9 to 10; 2T87-14 to 15; 2T96-3 to 19; 3T35-1 to 2). Moreover, medical evidence proved conclusively that on the night in question, Miss Jones had in fact had a sexual encounter. (4T26-7 to 25; 4T28-21 to 25). Semen matching respondent's blood type was found on Miss Jones' underpants. (4T78-20 to 24). Clearly, all of this evidence was strong evidence of respondent's guilt. On the other hand, the physical evidence gained from searching respondent's apartment added practically nothing to the determination that respondent had raped Marjorie Jones. Seminal stains were found on respondent's own bedsheet. (4T75-3 to 23; 4T77-19 to 22). This fact certainly had little probative value with regard to the issue of whether respondent raped the victim. In fact, respondent testified that he had engaged in sexual intercourse on the sheet with another woman prior to the date of the instant offense. (5T125-22 to 25; 5T126-10 to 11). Furthermore, respondent testified that his partner, Mack Ross, also engaged in sexual encounters on his bed. (5T126-12 to 17). In addition to seminal stains, head hairs which were similar to respondent's head hairs and head hairs similar to those of the victim were found on the bedsheet. (3T46-22 to 3T47-1;

3T47-19 to 3T48-8; 3T129-9 to 3T137-13; 4T19-18 to 4T20-13). The presence of hairs similar to respondent's on his own bed is certainly not surprising and, furthermore, is of little consequence to the criminal charges. Likewise, the fact that hairs similar to those of Marjorie Jones were present on the bedsheet is not probative of respondent's guilt. The experts who perfomed the tests on the bedsheet admitted that the results were not conclusive of anything. (3T140-5 to 22). Many people have hair which is morphologically the same. Thus, as stated by the expert witnesses, people cannot be accurately identified by their hair. (3T147-17 to 20). Additionally, it was never disputed that the victim was in respondent's one room apartment on the night of the offense. Hence, even if the tests conclusively proved that the hairs found on the bedsheet were those of the victim, it would not have a direct bearing on respondent's guilt.

Based upon the foregoing review of the record, it is clear that the trial judge's statement that he accorded little weight to the evidence gained from the search of respondent's apartment was fairly supported by the record. 28 U.S.C. sec. 2254(d) (8). Moreover, it is clear that the district court's implication that the state trial judge was less than candid when he said that the challenged evidence was of minor importance is wholly unfounded and in contravention of principles of comity and federalism.

In giving due regard to the state court judge's findings, it is clear that the introduction of the bedsheet evidence had absolutely no impact on the outcome of the trial. That this finding may be dispositive of the prejudice issue, which is a mixed question of law and fact,[22] does not bar application of

[22] While both the district court and court of appeals refused to give deference to the state trial judge's determinations regarding the significance he accorded the bedsheet evidence, it was not because the issue was a mixed question of law and fact. It is clear that the trial judge's statements of what evidence he relied upon in finding respondent guilty is not equivalent to a determination of ineffective

the presumption of correctness under sec. 2254(d). *Wainwright v. Witt, supra; Patton v. Yount, supra; Sumner v. Mata II, supra; Pullman-Standard v. Swint*, 456 U.S. 273, 287-290 (1982).

Even if deference is not accorded in this case, an independent review of the record makes it absolutely clear that the evidence obtained from respondent's apartment was of little significance and could not possibly have had any bearing on the determination of guilt. Thus, the admission of this evidence as it relates to respondent's ineffectiveness of counsel claim is of no great importance, as that evidence played no role in the ultimate determination of guilt.

Finally, petitioners point out that the admission of the bedsheet evidence in no way prejudiced respondent in his presentation of a defense. It is obvious from respondent's opening statement that his trial strategy and theory of defense were not altered or affected by the introduction of the bedsheet evidence. The defense theory as outlined in defense counsel's opening statement, before counsel knew that the bedsheet evidence would be introduced at trial, is what was in fact presented through the testimony of the defense witnesses at trial. Moreover, respondent had planned to testify[23] and was thus not forced to take the stand solely to explain any of the evidence concerning the bedsheet. It is clear that this was a necessary defense strategy in this case; it was obvious even before trial that credibility would be very important, if not totally deter-

[22] cont'd

assistance of counsel or the existence of prejudice. It is, rather, solely a pure factual finding directly bearing on that issue. Even if this issue were a "mixed" question, the factual aspects would certainly be entitled to the presumption of correctness. *Wainwright v. Witt, supra.*

[23] Respondent waived his Sixth Amendment right to a jury trial, apparently to enable him to testify without the potential detrimental effect of a jury learning of his prior record. (1T8-15 to 1T9-16).

minative of the outcome of the trial. Indeed, trial counsel's assessment that it was necessary for respondent to take the stand in his own behalf was borne out by the trial judge's later determination that the victim's testimony was not only credible but sufficiently compelling to prove respondent's guilt beyond a reasonable doubt. In any event, if respondent chose not to offer his own testimony to refute the bedsheet evidence, both respondent's partner, Mack Ross, and his girlfriend, Mamie Dupree, who testified at trial, could have offered explanations as to the presence of seminal stains and hairs on the bedsheet.

In sum, the finding by the state trial judge at a bail hearing following a trial in which he sat as fact-finder that evidence obtained from respondent's apartment had little significance on the issue of guilt is entitled to the presumption of correctness under 28 U.S.C. sec. 2254(d). Moreover, even without according deference to the state court judge's fact-findings, it is clear that the challenged evidence did, in fact, have little significance and, thus, its admission resulted in no prejudice to respondent.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the United States Court of Appeals for the Third Circuit remanding the matter to the district court be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 84-1661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRWIN I. KIMMELMAN, Attorney General of New Jersey, and John P. Rafferty, Superintendent, Rahway State Prison,
Petitioners,

v.

NEIL MORRISON,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

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COUNTERSTATEMENT OF THE CASE

Neil Morrison stands convicted by the Superior Court of New Jersey for rape of Marjorie Jones, and he is presently incarcerated at New Jersey State Prison in Rahway, New Jersey, where he is serving a sentence of imprisonment for eight to ten years.

At the trial, the first witness to testify for the prosecution was Marjorie Jones, herself. She stated that in October of 1977, she was fifteen years old and attending school in the eighth grade. 1T19-4 to 16. (References to the Record are in accordance with the legend devised by the petitioners. Brief for Petitioners at 6 n.1.) At that time she was living with her mother and her baby in a house at 109 North Main Street in Paterson, New Jersey, where her sister and sister's husband lived upstairs. 1T18-18 to 19; 53-22 to 54-10. At 107 North Main Street, next door to her home, was a seafood business known as Superior Crabs and owned by Mr. Morrison and another person, where Marjorie worked selling seafood between the hours of 5:00 p.m. and 9:00 p.m. 1T19-20 to 22-10.

On October 13, 1977, she reported to work at about 5:00 p.m. and observed Mr. Morrison behind the counter cooking shrimp, which she said he intended to deliver to customers. 1T23-14 to 24-6. She claimed that when Mr. Morrison told her to come with him, she replied that she did not want to, but changed her mind at his insistence. 1T24-10 to 24. They drove to three bars. 1T26-9 to 12. After the last delivery, she contended, he told her he planned to make one more stop to collect money with which to pay her wages. 1T29-4 to 15.

Mr. Morrison stopped the truck in which they were riding in front of a residential building on Park Avenue in Paterson, and Marjorie accompanied him upstairs. 1T30-6 to 25. She claimed, once again, that she did so at

his insistence. *Id.* The apartment consisted of one room, which, she testified, contained chairs, a bed, a tape player, clothes, a lamp, and a dresser. 1T31-13 to 19. Mr. Morrison asked her to have a seat, and she sat in the chair by the door and right next to the bed. 1T35-9 to 17; 36-18 to 22. After she had been there for about five minutes, there entered a lady who stayed for about five minutes. 1T33-4 to 12. About ten minutes later, a man by the name of "Wesley" entered the apartment. 1T33-13 to 18. Five minutes later, Wesley left to get something to drink with money given to him by Mr. Morrison. 1T34-7 to 14. Some time later, Wesley returned with a bottle, and he and Mr. Morrison had a drink for about five minutes. 1T34-15 to 19; 35-3 to 5; 36-2 to 4. At this point, not counting the time it took Wesley to get the bottle, Marjorie had been in the apartment, according to her own testimony, for about twenty-five minutes.

She testified that after Wesley left, Mr. Morrison turned off the light, shut the door, and laid on the bed. 1T36-10 to 19. She contended further that when Mr. Morrison asked her to come over to him, she replied that she would stay in the chair. 1T38-10 to 14. Then, she claimed, he pulled her arm behind her back and threw her on the bed. 1T39-2 to 7. Once she landed on the bed, he laid on top her. 1T39-18 to 20. At this point she had all her clothes on, which included the pants she was wearing. 1T67-23 to 25; 67.1-17 to 19; 68-3 to 4. According to her testimony, the entire time Mr. Morrison was on top of her, he kept a hand on her mouth. 1T67.1-7 to 16. With his other hand, he held her right arm behind her back. 1T67-9 to 16. She testified that at some point he pulled her pants down, she pulled them back up, and he pulled them down, apparently for a second time. 1T39-20 to 23. Marjorie stated that "when he pulled down my clothes he had put his penis

in my vagina," which according to her testimony "was before he put his hand over my mouth." 1T67-17 to 22. She testified that Mr. Morrison's pants were "[d]own to his knees—his ankles," but did not indicate as to when he was able to accomplish that. 1T40-12 to 14. When the prosecutor asked her if he ejaculated, she replied "Yes." 1T40-15 to 16.

Marjorie Jones stated that when Neil Morrison got off her, she rearranged her clothes, they walked downstairs and outside to the truck, where he opened the door for her, and she got in. 1T41-8 to 21. He drove her straight home. 1T42-2 to 9. She contended that after she went inside her house, she eventually related her story to her mother, who called the police. 1T42-20 to 24; 44-2 to 8. After the police arrived, she went to the hospital, where she spoke with JoAnn Tumminelli of the prosecutor's office and Dolores Most of the police department. 1T45-14 to 16; 46-7 to 23. She later accompanied Dolores Most to the apartment where the alleged crime occurred. 1T47-6 to 22.

During her testimony, Marjorie admitted that during October 1977 she was friendly with the father of her baby. 1T51-25 to 52-8. The father would occasionally visit with her and the baby in her house during the afternoon hours. 1T57-16 to 58-13. If her mother was not home, she would sometimes have "relations" with him. 1T59-18 to 60-5. She referred to her baby's father as "my boyfriend." 1T82-18 to 83-3. When asked whether she saw her boyfriend during the afternoon of the day in question, she testified that she could not remember. 1T54-11 to 57-15. She admitted, however, that when Mr. Morrison drove her home that night, her boyfriend was waiting for her in front of her house, and she talked with him for about ten minutes before she went inside. 1T52-19 to 53-9; 75-18 to 76-3.

There was no testimony as to what she talked with him about, and her boyfriend never took the witness stand.

Furthermore, Marjorie retracted a statement she had made to Dolores Most.

> Q. Did you tell anybody that Neil slid a bar in order to lock the door when you got into the apartment? Did you ever say that to anybody?
>
> A. Yes.
>
> Q. And that's not the truth, is it?
>
> A. No.
>
> Q. Because you found out later that there was no lock on the door; isn't that true?
>
> A. Yes.

1T63-22 to 64-6.

> Q. . . . You told the policewoman that you unlocked the door and that [you and Mr. Morrison] went downstairs to the truck and [Mr. Morrison] drove [you] home? Did you tell that to the policewoman?
>
> A. Yes.
>
> Q. But there was no lock for you to unlock; isn't that right?
>
> A. Yes.
>
> Q. All right. Then you went back to the apartment and Policewoman Most showed you that there were no locks on the door; isn't that true?
>
> A. Yes.

1T65-16 to 25.

Marjorie testified further that she told a judge, who was presiding over this case, presumably either at the

arraignment or at a preliminary hearing, that she did not wish to proceed with her complaint against Mr. Morrison. 2T9-9 to 12; 10-7 to 14. When asked why she did not want to go through with her complaint at that time, she responded that she did not know. 2T11-17 to 21.

Marjorie's mother, Hattie Mae Jones, was the prosecution's second witness. Mrs. Jones stated that she had wanted Marjorie to work, but denied that she had been concerned about Mr. Morrison's failure to pay her daughter, and could not remember whether she ever talked with him about Marjorie's pay. 2T35-8 to 37-4. She further testified that on the night in question after the alleged incident, she was sitting in the front room of the house when Marjorie came in. 2T16-3 to 4; 17-3 to 5. She followed Marjorie into her room and observed her change her panties. 2T17-6 to 25. She asked Marjorie what was wrong, to which Marjorie replied, "Nothing." When she repeated the question, Marjorie replied that her "period was on," and Marjorie went into the bathroom, rinsed out her panties, and threw them with the dirty clothes. Based upon those observations, she confronted Marjorie and asked, "Marjorie, what Neil Morrison done to you?" 2T18-2 to 9; 19-25 to 20-4. At that point, according to Mrs. Jones' testimony, her daughter told her that Mr. Morrison had raped her. 2T20-8 to 10.

As to this testimony of Mrs. Jones, the trial judge in rendering his judgment made the following comments.

> I do have a problem with Hattie Jones' testimony where she talks about the initial confrontation with Marjorie in the bedroom. After asking why she was changing her clothes, the girl said that she was having her period. The mother didn't believe that apparently and pressed her some more and then said to her, "What did Neil do to you?" That one comes right

> out of the blue, and I have some problems wondering what there was in the back of her mind that would prompt that initial question. It was not explained.

6T87-25 to 88-11.

Upon learning this information, the mother went upstairs to tell her other daughter. 2T20-11 to 23. She then sent her granddaughter to summon the alleged rapist, who responded and spoke with her. *Id.* When Mr. Morrison did not give her "a good understanding" of whatever happened with Marjorie, she had another daughter call the police. *Id.* Mrs. Jones admitted that Mr. Morrison did not tell her that he did anything to Marjorie. 2T33-2 to 15.

Mrs. Jones also confirmed that when she and her daughter appeared before another judge during the course of this matter, she told the judge that she wanted the charges against Mr. Morrison dropped. 2T34-9 to 24. She denied, however, that the charges had anything to do with pay owed to her daughter by Mr. Morrison. 2T34-25 to 35-15. She added that she also told the prosecutor's office "when it first happened" *and* a couple of weeks before the trial that she did not wish to go ahead with the case. 2T49-18 to 50-4; 51-18 to 22. When asked about her daughter's relationship with the father of her daughter's baby, Mrs. Jones testified that she was not upset to learn that her daughter continued to have sexual relations with him after the birth of the baby. 2T40-13 to 17; 41-16 to 19.

Mrs. Jones further testified that Marjorie washed out her panties over a time span of about five minutes. 2T74-13 to 75-2. Yet, when Mrs. Jones retrieved her daughter's panties and touched the crotch area, she felt "something sticky like," 2T21-5 to 17, "real sticky like." 2T31-3 to 6.

Police Officer Peter Talarico was on duty in a patrol car on the night of October 13, 1977, and he was the first to respond to the complaint. 2T86-2 to 19. He testified at the trial as to several points: That Marjorie complained to him that she was forced to have sex, 2T87-11 to 15; that she seemed upset and at one point began to cry, 2T88-17 to 25; that he delivered Marjorie's underpants to the hospital, 2T89-2 to 22; and that he helped arrange for an ambulance to transport Marjorie and her mother to the hospital. 2T90-20 to 91-2.

While Marjorie had testified that she told Officer Talarico that on the night in question she went to three taverns with Mr. Morrison, 1T80-13 to 15, Officer Talarico confirmed that she told him she went to only two. 2T91-9 to 13. Moreover, Marjorie denied telling the police that in the apartment where the alleged crime occurred she was seated on a chair in another room, 1T81-6 to 13, but her testimony was again contradicted by Officer Talarico. 2T91-14 to 19. He also testified that Marjorie told him she was dragged from the one room to the other, 2T91-20 to 24, but Marjorie had denied ever having told the police that. 1T81-15 to 20. Furthermore, Officer Talarico testified that Marjorie told him she was struggling with Mr. Morrison throughout her alleged ordeal, 2T91-25 to 92-9. but she had admitted she received no black and blue marks or scratches. 1T76-11 to 17.

Dolores Most, a detective with the Juvenile Division of the Paterson Police Department, testified next for the prosecution. She stated that she had Marjorie show her the apartment where the alleged crime occurred. 2T99-19 to 25. Once inside the building, she encountered Wesley Harris, a tenant, who told her the individual apartment belonged to Neil Morrison, opened the door to the apartment for her, and turned on the light. 2T100-8 to 19.

Detective Most went in and observed that no one was in the apartment. *Id.* When asked how many rooms were in the apartment, she replied, "there was the one room, and then off to the left towards the front of the apartment there was another, I would say, like a large closet. So it was actually just a one room apartment." 2T101-15 to 20. While in the apartment, Detective Most removed the sheet from the bed. 2T102-16 to 22. At that point, defense counsel objected to any further testimony concerning the bed sheet on the grounds that the search of the apartment and the seizure of the bed sheet were illegal. 2T102-23 to 103-2. The trial judge responded, "I think you're a little late on that, aren't you?" 2T103-3 to 4. Whereupon, a lengthy conference was held in chambers. 2T103-21 to 115-20.

During the conference, the judge remarked to Mr. Morrison's attorney,

> You bring about a very valid basis, Counselor, for suppression of this, if the motion had been brought and timely made. We are not going to entertain a motion to suppress in the middle of the trial.

2T110-18 to 22. The court went on to scold defense counsel,

> Why didn't you ask for [Detective Most's report] in 1977? I hate to say it, but I have to say it, that you were remiss. I think this evidence was there and available to you for examination and inquiry.

2T114-5 to 8. The conference was concluded with the judge stating, "I'm sorry, I'm going to admit this testimony." 2T115-18 to 19. Detective Most then resumed the stand and related how the bed sheet, along with the panties, was eventually turned over to the State Police Lab. 3T6-19 to 22.

On cross-examination, Detective Most admitted that on three separate occasions Marjorie Jones referred to a lock on the door of the apartment where the alleged crime occurred, but the detective confirmed that there were in fact no locks on the door. 3T7-19 to 8-5. She went on to testify that Marjorie told her Mr. Morrison had grabbed her left arm, 3T19-8 to 11, but Marjorie testified that it was her right arm that had been twisted. 1T79-15 to 25; *cf.* 1T38-15 to 39-14.

Erma L. Hoover, a Senior Forensic Chemist with the New Jersey State Police, next testified that in her opinion based on the tests performed by her, a blood sample given by Mr. Morrison was of blood group O, 3T124-16 to 126-5, and his saliva sample gave reactions of a secretor and for blood group O. 3T126-2 to 129-8. She also stated that there were hairs removed from the bed sheet which compared with the head hair samples given by Mr. Morrison and *one* which compared with the head hair samples given by Marjorie Jones. 3T135-16 to 20; 137-8 to 13; *cf.* 3T96-24 to 98-7. Furthermore, she testified that she found nothing to indicate that the comparisons were not accurate. 3T153-21 to 154-8; 155-4 to 10. There was no testimony from her concerning any similarity between the hairs removed from the bed sheet and pubic hair samples given by Marjorie.

The next prosecution witness, Kenneth Sowa, was a Senior Laboratory Technician with the State Police Laboratory when he tested certain pieces of evidence. 4T3-7 to 23. He determined that two stains on the bed sheet and the stain in the crotch area of Marjorie's underpants contained semen. 4T19-15 to 20-13; 23-5 to 24-20. He cut the two stains from the sheet and sent them to the serology department for further analysis. 4T22-11 to 24. He also performed tests on a vaginal wash taken from Marjorie at

the hospital and on the syringe with which the wash was taken. On the syringe he detected a weak reaction for semen, which he admitted could have been caused by a normal vaginal secretion. 4T24-21 to 25-21; 53-24 to 54-10; 64-10 to 14. His tests on the vaginal wash indicated the presence of semen and spermatozoa. 4T26-7 to 28-5. Nevertheless, analysis of four separate specimens taken from in and around her vagina tested negative. 4T52-22 to 53-23; *see* 56-20 to 57-5.

Another forensic chemist with the State Police, Coleen Craven, then testified for the prosecution about further tests which she conducted. She analyzed both stains cut by Mr. Sowa from the bed sheet confiscated by Detective Most. 4T73-15 to 22. Her purpose was to determine the presence of human seminal stain and the secretor status and blood group of the stains. *Id.* Despite Mr. Sowa's testimony that there was no question that both bed sheet stains were seminal stains, 4T22-25 to 23-4, Ms. Craven determined that only one of the stains was positive for human semen. 4T75-7 to 13. Further testing by her of the positive stain revealed reactions for a secretor and for blood group O. 4T77-16 to 22. Her testing of the underpants stain (specimen #13) was positive for human seminal stain and gave the reactions for secretor and for blood group O. 4T77-23 to 78-24.

At the conclusion of the prosecution's case, the remainder of the panties and bed sheet were admitted in evidence, S-6 and S-8 respectively. 4T112-15 to 116-25; 117-16 to 20. Mr. Morrison's head hair samples, S-14, and Marjorie's head hair samples, S-15, were subsequently admitted in evidence. 4T122-21 to 123-9. Marjorie's pubic hair samples, S-16 for identification, having no relevance, were not sought to be admitted in evidence by the prosecution. 4T123-10 to 15. Mr. Morrison's blood sample had

been destroyed for health reasons after analysis. 4T123-16 to 22. With that, the prosecution's case was concluded. *See* 4T125-25 to 126-2.

When Mr. Morrison took the stand in his own defense, he testified that on the date in question he helped operate the Superior Crab Company, along with Mack Ross and Evelyn Page. 5T114-5 to 18. He had been doing so for about four months. *Id.* He returned to the crab store at about 4:00 p.m. or 4:15 p.m. on that day and saw Marjorie Jones, whom he had hired two weeks previously, and who had just been terminated by his partner, Mack Ross. 5T115-16 to 116-18. Marjorie encountered Mr. Morrison outside the store and asked him for her pay, but inasmuch as there had been a break-in the night before, he could not pay her until he received some money from his customers. *Id.* Marjorie protested that she and her mother wanted her to be paid right away, and shortly thereafter her mother called Mr. Morrison from her house next door and strongly reiterated her demand. 5T116-25 to 118-14. When Mr. Morrison explained that he would have to collect the money from some customers in Passaic, Marjorie, in the presence of her mother, offered to go with Mr. Morrison so that she could receive her payment as soon as possible. 5T118-15 to 119-13. After calling on three taverns, Mr. Morrison offered to stop at the building where he lived to collect money due him from tenants at that location. 5T119-14 to 121-18.

When they arrived at the building on Park Avenue, Marjorie and Mr. Morrison went with Wesley Harris, a tenant who had opened the door for them, into the front room, which belonged to Mr. Morrison. 5T121-19 to 122-10. Mr. Morrison sat down on a couch in the room, and Marjorie sat down on the bed. 5T124-25 to 125-8. The bed was covered with a sheet that Mr. Morrison stated had

been on the bed for a "couple of weeks." 5T125-17 to 21. Mr. Morrison admitted that on some occasions his girlfriend, Mamie DuPree, would spend the night with him in that room and that when he would stay with her at her residence, his room would be used on occasion by his partner, Mack Ross, for sexual purposes. 5T125-22 to 126-18.

While he and Marjorie were at that location, Mr. Morrison attempted unsuccessfully to collect rent from Mr. Harris and one other tenant. 5T122-8 to 124-18. Mr. Morrison denied that he ever touched or abused Marjorie in any way. 5T124-19 to 24; 126-19 to 21. Thereafter, they drove back to the store. 5T126-22 to 127-2. Marjorie stayed for five or ten minutes, took some crabs from behind the counter, and left. 5T127-12 to 19.

Mr. Morrison continued testifying that about an hour later he was summoned to see Marjorie's mother by a little girl, who had been sent by Mrs. Jones. 5T128-8 to 129-2. Mrs. Jones was very upset that her daughter had not been paid, and told Mr. Morrison, "I'll fix you." *Id.* Subsequently, Mr. Morrison learned that Marjorie was accusing him of rape. 5T129-3 to 131-17.

Before the arraignment in Paterson Municipal Court, Mrs. Jones again summoned Mr. Morrison and told him the charges were a mistake, Marjorie had been with her boyfriend, and she would try to drop the charges. 5T131-18 to 132-23 She in fact attempted to do so when they appeared before the judge. *Id.*

Two days before the actual trial, according to the further testimony of Mr. Morrison, he again spoke with Mrs. Jones, having been summoned once again by a little girl. 5T132-24 to 135-20. She repeated her desire to have the charges dropped, and Mr. Morrison replied that he would

seek the advice of his lawyer. *Id.* Mrs. Jones asked Mr. Morrison to contact her, and she wrote her telephone number on a piece of paper, which Mr. Morrison produced in court. *Id.* When Mr. Morrison was unable to contact his attorney, he returned to Mrs. Jones' apartment (Mrs. Jones and Marjorie having moved to an apartment in the interim) with Mack Ross and told Mrs. Jones that he was not able to contact anyone and that she should talk with the prosecutor. 5T135-23 to 137-25. Marjorie was present at that time and stated not only that Mr. Morrison had had "no involvement" with her, but also that she had been scared because Mrs. Jones had not wanted Marjorie's boyfriend to visit her at their house. 5T138-2 to 10. The telephone number notation, allegedly written by Mrs. Jones, was eventually admitted in evidence. 6T12-22 to 13-6.

Prior to Mr. Morrison's testifying, four other witnesses, who had been excluded from the courtroom during the trial, gave testimony which substantially coincided with Mr. Morrison's version of events. Mamie DuPree stated that she was Mr. Morrison's girlfriend at the time of the alleged crime, having started "going with him" in June of 1977. 5T32-12 to 33-17. At the time of her testimony, in fact, they were living together, and she was pregnant with his child. 5T39-9 to 22; 40-23 to 41-3.

Mack Ross testified that he and Mr. Morrison had a crab business, that he had terminated Marjorie on the date in question, and that she had asked him for her money. 5T45-17 to 48-9. He terminated Marjorie because her boyfriend would visit her while she was working, and they would frequently leave together for an hour or more. 5T52-23 to 53-7. Mr. Ross stated that on the date in question, Mr. Morrison and Marjorie drove to Passaic in an effort to collect money with which to pay her and that

they returned to the store between 6:30 p.m. and 7:00 p.m., whereupon Marjorie left with her boyfriend. 5T48-14 to 49-15. He admitted that they owed Marjorie about $80.00 and claimed that their store had been broken into the night before. 5T56-18 to 57-8. Furthermore, Mr. Ross described his accompanying Mr. Morrison two days before the start of the trial to Mrs. Jones' apartment, where Marjorie admitted that the charges against Mr. Morrison were a mistake. 5T66-17 to 67-11.

Evelyn Page testified that she lived across the street from Mr. Morrison's place of business, where she would occasionally help out. 5T68-11 to 20. She stated that she was at the store when Mr. Morrison and Marjorie came in around 6:30 p.m. 5T74-9 to 13; 76-10 to 12. She claimed that Mr. Morrison remained in the store in her presence until 9:00 p.m. 5T77-16 to 24. She continued to work until 9:45 p.m. 5T87-2 to 5.

Wesley Harris testified that he rented a room from Mr. Morrison in the same building in which Mr. Morrison lived. 5T89-3 to 7; 98-4 to 6. He stated that on the evening in question he was there "all the time," opened the door to the building for Mr. Morrison and Marjorie at about 6:00 p.m., and went with them into the front room, where Marjorie sat on the bed. 5T90-2 to 91-25. Mr. Morrison asked him for the rent, which he was unable to pay, and then left to speak with another tenant. 5T92-4 to 24. Mr. Harris was in the room with Mr. Morrison and Marjorie when Mr. Morrison decided to leave. 5T97-14 to 25.

After closing arguments, the trial judge reviewed his notes and found Mr. Morrison guilty of all charges. 6T85-13 to 92-16. In rendering his decision, the judge noted that the case was not "cut and dry" and that there were discrepancies in the testimony presented by both

sides. 6T86-6 to 8. Having commented briefly on some of the inconsistencies, the judge stated, "I won't comment any more upon the testimony" and rendered judgment. 6T92-10 to 16.

Mr. Morrison, represented by assigned counsel, sought bail pending appeal on the grounds that the admission of the bed sheet was substantial error that should be reviewed by the appellate court. MT8-1 to 5. In considering the application, the trial judge stated that "the sheet and the tests that resulted therefrom obviously were important," but went on to remark that it was "just one small phase in this whole case." MT11-6 to 15. The motion was denied. MT16-14 to 19.

On an appeal to the Appellate Division of the Superior Court, Mr. Morrison challenged the convictions on grounds which included the ineffectiveness of his trial counsel in failing to move pretrial for the suppression of the bed sheet. Pa13a. The appellate court did not find his trial counsel competent, as contended by the petitioners (Brief for Petitioners at 8), but rather held that "[d]efendant has not carried his burden of demonstrating that his attorney's inadequacy was of 'such magnitude as to thwart the fundamental guarantee of a fair trial.'" *Id.* The case on which the Appellate Division relied was a Supreme Court of New Jersey case adopting the rigid "farce or mockery" standard, while the prevailing federal law at the time required the application of the less rigid "normal competency" standard. HT6-10 to 17 (Aa42). It should be noted that the United States District Court for New Jersey later held that Mr. Morrison's trial counsel was ineffective under either standard. Pa31a-32a n.7.

Once the Appellate Division affirmed Mr. Morrison's conviction for rape, Mr. Morrison sought review by the

State Supreme Court on the grounds not only that he was deprived the effective assistance of counsel at his trial, but also that the standard of review used by the Appellate Division was unconstitutional. *See* Pa25a-26a & n.3. The New Jersey Supreme Court, however, denied certification. Pa15a.

Over a year later, Mr. Morrison by a motion for post-conviction relief sought a new trial, PCR2-6 to 9 and 46-11 to 15, on the grounds that he did not receive a fair trial because of the admission of the bed sheet and his trial counsel's ineffectiveness in preventing that evidence from being used against him. PCR3-20 to 4-18. Although the trial judge remarked that "the only point at which [defense counsel] became surprised was at this testimony about the bed sheet from Detective Most," and assigned counsel interrupted, "[a]nd that was a major point," at no time during the argument of this application did the trial judge deny that the testimony about the bed sheet was a major point or otherwise discuss what importance he attached to that evidence. PCR29-10 to 14. The motion was denied on the grounds that the trial court had no power to grant the requested relief, the same issues having been ajudicated on appeal. PCR65-24 to 66-3.

The remainder of the procedural history of this case, that dealing with the granting of a writ of habeas corpus by the United States District Court for New Jersey and its review by the United States Court of Appeals for the Third Circuit, is adequately set forth by the petitioners. Brief for Petitioners at 9-10.

SUMMARY OF ARGUMENT

The case against Respondent Neil Morrison was a close one. There is a reasonable probability that but for the admission in evidence of the bed sheet and testimony

concerning tests performed on the bed sheet, he would have been acquitted. The trial judge never made a finding of fact, entitled to deference by the Federal courts, that the bed sheet evidence did not affect the outcome. Mr. Morrison was plainly denied his Sixth Amendment right to effective assistance of counsel when his trial attorney failed to move to suppress the bed sheet, which was beyond a doubt the product of an illegal search and seizure.

The *Stone* doctrine should not be extended to Sixth Amendment issues where the ineffectiveness of trial counsel deprived the defendant of an opportunity for the full and fair litigation of his Fourth Amendment claim. The Sixth Amendment right to effective assistance of counsel implicates an entirely different set of concerns than does the exclusionary rule. The former is an essential component of our constitutional system, while the latter is a judicially created doctrine. If the case is viewed as a procedural default properly analyzed using the *Sykes* test, Mr. Morrison meets the "cause" and "prejudice" requirements. The case, however, should be evaluated as an ineffective assistance of counsel claim using the recently established criteria of *Strickland*, which Mr. Morrison also satisfies.

ARGUMENT

POINT I

ELIMINATNG THE BED SHEET AND THE RESULTS OF TESTS PERFORMED ON IT IS MORE THAN SUFFICIENT TO UNDERMINE CONFIDENCE IN THE RESPONDENT'S CONVICTION.

While the petitioners assert that "[w]ithout regard to the evidence emanating from the bedsheet, overwhelming evidence of guilt existed," Brief for Petitioners at 45,

both the State court trial judge and the Federal district court judge disagree, even when viewing the evidence inclusive of the bed sheet and the tests performed on it. Not only did the trial judge state that the case was not cut and dry, 6T86-6, but the district judge also specifically found that the evidence in support of the conviction "was not overwhelming." *Morrison* v. *Kimmelman*, 579 F.Supp. 796, 803 (D.N.J. 1984). Given the serious discrepancies in the testimony of Marjorie Jones and her mother, which the trial judge acknowledged, 6T86-7, their testimony could only have become believable in the context of the scientific evidence. Conversely, the scientific evidence without a doubt rendered Neil Morrison's testimony less believable. As the prosecutor, himself, so accurately predicted in his opening statement,

> I would ask that the Court pay particular attention to the scientific evidence which is going to be produced in this case, because that's going to have a strong bearing on the Court's decision as to guilt or innocence in this case.

1T15-14 to 19.

In considering the application of Mr. Morrison for bail pending appeal, the trial judge remarked that "the sheet and the tests that resulted therefrom *obviously* were important," MT11-6 to 8 (emphasis added), and when Mr. Morrison's counsel in arguing a subsequent motion asserted that the testimony about the bed sheet was a major point, PCR29-12 to 14, the trial judge did not deny it.

That evidence certainly *was* crucial. Not only did it confirm that Marjorie Jones had been on Neil Morrison's bed, but it strongly implied that Mr. Morrison had engaged in sexual activity recently enough to suggest that the unwilling participant in his activity was indeed

Marjorie. Unless the trial judge was inclined to believe that Mr. Morrison had left the bed in his one room apartment covered only with a semen stained bed sheet and that Marjorie voluntarily sat on it, which were his truthful explanations, the bed sheet evidence was integral to the judgment of conviction. Sometimes the truth is inherently unbelievable, especially when evaluated by someone whose lifestyle is fundamentally different from that of the deponent and the complainant.

If the presence of Marjorie Jones on that bed sheet was on account of her having been forcibly raped there, then why was there not found a single pubic hair of hers and only one head hair? Without the bed sheet testimony, the rest of the scientific evidence adds up only to the fact that Marjorie had sexual intercourse with a man of Mr. Morrison's blood type and secretor status, which are obviously far from unique, some time prior to the confiscation of her underpants and the obtaining of a vaginal wash. The inference was permissible that she had recently had "relations" with her boyfriend, possibly that afternoon. If, as Marjorie testified, Mr. Morrison had ejaculated while raping her that very evening, then why the negative results from the analysis of four separate specimens taken from in and around her vagina and the weak reaction for semen from the syringe inserted into her vagina?

A. The Prejudice Inquiry.

The legal test for determining whether one has been sufficiently prejudiced by the ineffectiveness of his counsel is set forth in *Strickland* v. *Washington*, 104 S.Ct. 2052 (1984). While "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," he "need not show that coun-

sel's deficient conduct more likely than not altered the outcome in the case." 104 S.Ct. at 2067-68.

> The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.
>
> . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

104 S.Ct. at 2068.

In the circumstances of this case, given the unreliability of the testimony of Marjorie and her mother standing alone, Mr. Morrison's bed sheet on which the alleged rape occurred and the related test results probably were the link that did determine the outcome of the trial. Clearly, the evidence of guilt minus the bed sheet evidence would cause a reasonable factfinder to lose confidence in the conviction. Inasmuch as "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," 104 S.Ct. at 2069, can any reasonable person honestly maintain that it was not fundamentally unfair for the prosecution to have used the bed sheet evidence against Mr. Morrison?

A timely motion to suppress the bed sheet by Mr. Morrison's trial counsel would clearly have been meritorious. Not only did the trial judge, himself, remark that there was "a very valid basis . . . for suppression," 2T110-18 to 19, but the district judge also noted that "we cannot conceive of any legitimate claim that the search and seizure was constitutional." 579 F.Supp. at 802. The

Court of Appeals agreed. 752 F.2d at 922. New Jersey case law, applying Federal constitutional principles, manifests that such a motion would have been granted. *State* v. *Scrotsky*, 39 N.J. 410 (1963). In *Scrotsky*, a warrantless search of a tenant's apartment was conducted by a police officer in the company of the landlord who had reserved no right of entry as part of the letting. *Id.* at 413-15. The court first noted that

> [p]roof of entry by police officers into a person's home without a proper search warrant, and the taking of articles to be used in support of a criminal charge against him, without more, makes out a *prima facie* case for suppression of the seized evidence.

Id. at 414. Then relying on *Chapman* v. *United States*, 365 U.S. 610 (1961), the court held that the search was unconstitutional. *Id.* at 416; *cf. Stoner* v. *California*, 376 U.S. 483 (1964) (search of suspect's hotel room with consent of hotel clerk is unconstitutional).

The search of Mr. Morrison's room and the seizure of his bed sheet by Detective Most, a twenty year veteran of the Paterson Police Department, 2T95-10 to 13, were not even made in good faith, inasmuch as she knew, or at least reasonably should have known, that a warrant was required. *Cf. Procunier* v. *Navarette*, 434 U.S. 555 (1978) (good faith defense unavailable in action brought under 42 U.S.C. § 1983 where one acts in disregard of clearly established constitutional rights). Before the District Court, the petitioners admitted that on the record before the court, there was no apparent justification for the search and seizure.

> Court: You represent the State here, sir. Do you have even a colorable claim that that search and seizure was constitutional?

> Deputy Atty Gen.: Based upon the record I saw, no.

HT13-8 to 11 (Aa49).

Furthermore, the petitioners should not be permitted to maintain that Mr. Morrison was not prejudiced by the ineffectiveness of his counsel where the prosecution, itself, urged the trial judge to deem defense counsel's suppression motion untimely and where such motion could have been heard in the course of the bench trial with little inconvenience to anyone. Inasmuch as the defense is entitled to discovery, the prosecution often, if not routinely, permits discovery without a formal request. Here, however, the prosecutor sandbagged defense counsel. He delivered a lab report to defense counsel which mentioned a bed sheet, but withheld from defense counsel the report of Detective Most which admitted that the sheet had been seized from Mr. Morrison's bed. 2T108-23 to 114-4 (Aa18-24). The prosecution, therefore, was an active and knowing participant in the unfairness to Mr. Morrison, and the petitioners should not be permitted to urge now that the bed sheet evidence was not prejudicial.

B. The Deference Question

It is apparent that the petitioners regard their bias as pristine truth, because when they infer from remarks made by the trial judge upon rendering judgment and in considering a subsequent motion that the bed sheet evidence "had no impact on the verdict" and "did not affect the result," Brief for Petitioners at 35, they assert that inference as if it had been an actual "finding" made by the trial judge. It assuredly is no such thing. This "finding," they contend, is both binding on the Federal courts and dispositive of the prejudice inquiry. Brief for Petitioners at 46.

At the conclusion of the trial, the judge stated "*some* of [his] observations." 6T85-24 to 92-16 (emphasis added).

> As in most cases nothing is cut and dry. There are discrepancies in the State's case; there are discrepancies in the defense as it's presented.

6T86-6 to 8. It is true that the trial judge goes on only to comment briefly on the testimony of each fact witness, but nowhere does he say that the case was decided solely on the fact witness testimony or the credibility of the fact witnesses, and nowhere does he say that he "did not consider any of the physical evidence," as contended by the petitioners. Brief for Petitioners at 36. It is inconceivable that the judge was not influenced by the scientific evidence, especially that concerning the bed sheet. Such evidence, as predicted by the prosecutor, had to have enhanced whatever credibility Marjorie and her mother would otherwise have been accorded. At the conclusion of the trial, therefore, not only had no finding of fact been made by the trial judge as to the weight given the bed sheet evidence, but also no legitimate inference that such evidence was unimportant could be drawn from his admittedly incomplete remarks.

When Mr. Morrison later sought bail pending appeal on the grounds that the refusal to suppress the bed sheet constituted a substantial question for review, it is true that the trial judge remarked that "[t]he sheet was just one small phase in this whole case." MT11-14 to 15. What the petitioners fail to mention, however, is that the court first stated that "the sheet and the tests that resulted therefrom *obviously* were important." MT11-6 to 8 (emphasis added). That statement was made in a colloquy with the prosecutor who had remarked, "I don't think that [the bed sheet] was of such major importance that the case rose or fell on the sheet itself." MT8-21 to 23.

Nowhere did the trial court make "a specific factual finding . . . that its verdict was independent of the challenged evidence," as asserted by the petitioners. Brief for Petitioners at 36. The denial of bail pending appeal does not imply that the bed sheet evidence was inconsequential, *Id.*, but simply suggests the judge's confidence in having denied the suppression motion as being untimely. That denial was upheld by the Appellate Division, Pa13a, and the procedural bar on which the trial judge based his decision is not challenged by Mr. Morrison. The only other opportunity for the judge to comment on the bed sheet evidence occurred in considering a post-conviction relief application when Mr. Morrison's new counsel asserted that the testimony about the bed sheet was "a major point." PCR29-12 to 14. The judge, however, neither denied it, nor otherwise commented.

Actually, the trial judge did not explicitly make a single finding of fact, as such, at any time. What bits and pieces of the judge's remarks the petitioners wish to characterize as "findings" were nothing more than comments or, as the judge, himself, characterized them, "observations." 6T86-5. The petitioners would have this Court believe that the trial judge was required by New Jersey Court Rule 1:7-4 to make specific findings of fact. Brief for Petitioners at 35 & 37 n.18. That rule provides, "In criminal . . . actions so tried [*i.e.*, without a jury], it [the court] shall make a general finding and shall, in addition, on request find the facts specially. N.J. Ct. R. 1:7-4. No request was made for the trial judge to find the facts specially. He rendered a general finding of guilty, after having stated some of his "observations." The trial judge, therefore, was not required to make specific findings of fact, and did not choose to do so. In addition, 28 U.S.C. § 2254(d)(1) provides an exception to the deference

requirement where "the merits of the factual dispute were not resolved in the State court hearing." There was undoubtedly no resolution of the issue concerning the extent to which the bed sheet evidence affected the outcome of the trial.

Whatever deference should ordinarily be accorded the factual finding of a State court, it is clear that the judge who convicted Mr. Morrison never concluded that the bed sheet evidence did not affect the result. Certainly, the Federal courts are not bound by the petitioners unwarranted inference from the trial judge's incomplete remarks. Both the District Court, 579 F.Supp. at 804, and the Court of Appeals, 752 F.2d at 923 n.2, held that the State judge made no such finding.

C. The Performance Inquiry.

Strickland mandates that "the defendant must show that counsel's representation fell below an objective standard of reasonableness." 104 S.Ct. at 2065. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* This performance standard is essentially the same one that has been employed in the Third circuit since 1970, *Morrison* v. *Kimmelman*, 752 F.2d 918, 922 n.1 (3d Cir. 1985), and the one which the Appellate Division of the Superior Court of New Jersey undoubtedly should have applied, but did not. Despite the petitioners' contention that the respondent failed to demonstrate that his trial counsel was ineffective under this standard, the only two courts, both Federal, to have properly considered this question found otherwise.

> The district judge concluded that counsel was grossly ineffective. We have no difficulty in reaching the same conclusion.

752 F.2d at 922. Even the trial judge scolded defense counsel, "I hate to say it, but I have to say it, that you were remiss." 2T114-6 to 7.

Moreover, before the District Court, the following colloquy took place.

> Court: It is quite shocking, really.
>
> Deputy Atty Gen.: What is, your Honor?
>
> Court: That a man should represent somebody in a case and not ask for a single piece of discovery.
>
> Deputy Atty Gen.: Absolutely. He made a mistake. No reasonable person could tell you otherwise.

HT12-7 to 13 (Aa48).

POINT II

NEITHER *STONE* V. *POWELL* NOR *WAINWRIGHT* V. *SYKES* SHOULD BE EXTENDED TO BAR CONSIDERATION OF THE RESPONDENT'S SIXTH AMENDMENT RIGHTS BASED ON HIS TRIAL COUNSEL'S FAILURE TO ADVANCE HIS FOURTH AMENDMENT CLAIM.

The broad holding of *Stone* v. *Powell*, 428 U.S. 465 (1976), is that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." 428 U.S. at 494. This doctrine, however, should never apply to a claim for habeas relief based upon the denial of a Sixth Amendment right to effective assistance of counsel, because there can be no "opportunity for full and fair litigation" where defense counsel's ineffectiveness deprives a defendant from availing himself of the

opportunity. An opportunity provided to one who is helpless to take advantage of it is no opportunity at all.

The petitioners rely heavily on *LiPuma* v. *Comm'r, Dept. of Corrections*, 560 F.2d 84 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977). Brief for Petitioners at 15-17. The court in that case held that the failure of trial counsel to file a suppression motion did not constitute ineffective assistance of counsel under the circumstances of that case and also determined that there was no reasonable possibility of prejudice to the defendant. 560 F.2d at 90-93. Having disposed of the Sixth Amendment claim, the court added in a short paragraph and footnote with little discussion at the end of a nine page opinion that "the case comes within the holding in *Stone* v. *Powell*." Aside from the fact that this statement was in all likelihood mere dictum (*Morrison*, 752 F.2d at 920; *see Allah* v. *Henderson*, 526 F.Supp 282, 285-86 (S.D.N.Y. 1981), *aff'd mem.*, 697 F.2d 287 (2d Cir. 1982)), the court was influenced both by the fact that a full factual development had occurred in that case and by its feeling that the Sixth Amendment claim was a subterfuge. 560 F.2d at 93-94 n.6. ("Sixth Amendnent claim has been added for good measure"); *see Maxwell* v. *Mabry*, 672 F.2d 683 (8th Cir. 1982). Mr. Morrison's Fourth Amendment claim, however, was netiher developed nor considered at trial because of his counsel's ineptness, compounded by the trial judge's intransigent refusal to hold a straightforward suppression hearing during what was, after all, a bench trial. *Accord*, *Sallie* v. *North Carolina*, 587 F.2d 636 (4th Cir.), *cert. denied*, 441 U.S. 911 (1978).

Not only was Mr. Morrison denied the full and fair litigation of his Fourth Amendment claim, but he was also inexcusably denied the full and fair consideration of his Sixth Amendment claim when the State appellate court

applied an incorrect and more stringent standard to its consideration of that claim. While the State court employed the "farce or mockery" standard, *State* v. *Edge*, 57 N.J. 580, 593 (1971), Pa13a, the prevailing Federal rule in the Third circuit at the time was the "customary skill and knowledge" standard. *E.g.*, *United States* v. *Williams*, 631 F.2d 198, 200 (3d Cir. 1980). The Court of Appeals below equated this test with the "objective standard of reasonableness" test set forth in *Strickland*. 752 F.2d at 922 n.1.

There is no question that the "farce or mockery" standard is a narrower scope of review than the other test. Until *Strickland* there was no uniformity among the Circuits as to the applicable standard. *Morrison*, 579 F.Supp. at 803 n.7. The First Circuit, for instance, applied the "farce or mockery" standard that the New Jersey State courts used. *United States* v. *Madrid Ramirez*, 535 F.2d 125, 129 (1st Cir. 1976); *see Moore* v. *United States*, 432 F.2d 730, 737 n.26 (3d Cir. 1970). In doing so, the First Circuit acknowledged that its standard was not as favorable for habeas claimants as the "reasonably competent assistance of counsel" standard. 535 F.2d at 129-30. Likewise, the Third Circuit Court of Appeals recognized that its standard of "normal competency" was a lower threshold determination than the "mockery, sham or farce" standard that it had previously used. 432 F.2d at 737.

In refusing to extend the *Stone* v. *Powell* doctrine, the analysis of the Court of Appeals below is especially persuasive.

> The Sixth Amendment, which [the petitioners] would have us include under the bar of *Stone*, implicates an entirely different set of concerns than does the exclusionary rule. As Justice Powell notes, the exclusionary rule, although it arises out of a constitutional right, is merely a judicially created doctrine. The Sixth Amendment, however, is an essential component of our constitutional system. The exclusionary rule was created to deter police officers from engaging in illegal searches and seizures. Its application frequently affected the truth finding process adversely by excluding relevant, trustworthy and probative evidence. The rule had no bearing on the integrity of the trial. The Sixth Amendment, on the other hand, was adopted to safeguard the trial and the integrity of the fact-finding process and the fundamental rights of defendants.

752 F.2d at 921.

The Court of Appeals placed great reliance on the language of *Stone*, itself.

> In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review.

752 F.2d at 921. That is precisely the showing that Mr. Morrison now demonstrates. The ineffectiveness of his counsel denied him the opportunity for full and fair litigation of his Fourth Amendment claim at trial, and the application of an erroneous standard by the State appellate court denied him that opportunity on direct review.

The Court of Appeals relied also on the affirmation of the critical role of trial counsel set forth in *Strickland*.

> The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. . . . An accused is entitled to be assisted by

> an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

104 S.Ct. at 2063.

The petitioners further contend that the Court of Appeals failed to address the applicability of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Brief for Petitioners at 21 n.6. On the contrary, the Court of Appeals pointed out that this Court in that case avoided applying the *Stone* doctrine to an alleged *Miranda* violation when there had been a full and fair opportunity to raise the argument in the state proceedings. 752 F.2d at 922. The petitioners assert that this case should not be analyzed as one involving allegedly ineffective assistance of counsel, but rather as a "*Sykes* procedural default," because Mr. Morrison's counsel, who failed to make a timely objection to the admission of the bed sheet obtained in clear violation of the Fourth Amendment, was otherwise competent. Brief of Petitioners at 20-21. In so doing, they attempt to create a straw man with a non sequitur. Is it any wonder that the Court of Appeals did not give the issue as much attention as the petitioners apparently think it deserves? Mr. Morrison obviously had nothing to do with the procedural default of his counsel. Even applying *Wainwright*, Mr. Morrison undoubtedly would satisfy the "cause" and "prejudice" requirements. *See* Point I (A) & (C), *supra*. This case nonetheless clearly involves a Sixth Amendment claim for ineffective assistance of counsel and should be evaluated under the recently established criteria of *Strickland*.

CONCLUSION

For the foregoing reasons, Respondent Neil Morrison respectfully urges this Court to reinstate the Writ of Habeas Corpus granted by the United States District Court for the District of New Jersey.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 84-1661

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRWIN I. KIMMELMAN, et al.,

Petitioners,

—v.—

NEIL MORRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *AMICI CURIAE*

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December 1985

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members; the ACLU of New Jersey is one of its state affiliates. The ACLU has been particularly active in preserving and defending both the critically important rights against unlawful search and seizure and to effective assistance of counsel, and the procedural vehicle of federal habeas corpus, which helps to make the rights afforded defendants in criminal cases more than paper guarantees. We submit this brief amici curiae in the hope that it will assist the Court's resolution of this case, which implicates and threatens both these vital substantive rights and the equally important procedural means of redress.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, like others the Court has faced in recent years, involves two conflicting legal principles: the principle inherent in our adversary system of justice that a party -- even a defendant in a criminal case -- is ordinarily charged with the conduct undertaken on his behalf by counsel, and the principle that no one should be found guilty of criminal misconduct without being afforded the right to effective assistance of counsel. Just two terms ago, this Court seemingly resolved the tension between those principles by holding that, whenever counsel's conduct falls below an objective standard of reasonableness, and where there is a reasonable probability that the failings of counsel undermine confidence in the outcome, a defendant is entitled to relief (either on appeal or on federal habeas corpus) on the ground that his Sixth

Amendment right to effective assistance of counsel has been infringed. Strickland v. Washington, 80 L.Ed.2d 674 (1984).

The narrow but important question presented here is whether that resolution will apply across the board to all constitutionally ineffective failings defense counsel might make which would undermine confidence in the outcome -- that is, confidence that the defendant would not, after all, have been convicted -- or whether the virtues of a uniform rule will be undermined by a series of exceptions pertaining to different constitutional rights.

Looking at the case from the Sixth Amendment perspective set out in Strickland, the Third Circuit properly ruled that the defendant could not be held responsible for a constitutionally ineffective failure to raise a plainly meritorious Fourth Amendment

claim. Counsel's failure, and the defendant's consequent attempt to litigate on federal habeas corpus a claim involving an issue not properly raised below, requires the application of the "cause and prejudice" standards of Wainwright v. Sykes, 433 U.S. 72 (1977), as the state concedes. A defendant necessarily has good cause for not properly submitting his claim to the state court where his counsel was constitutionally ineffective in not doing so: for the very meaning of a determination that there was ineffective assistance of counsel is that a defendant is relieved from responsibility for his counsel's errors. Just as counsel's constitutionally ineffective failure to raise a double jeopardy claim, or a self-incrimination claim, or to challenge a lineup, may constitute cause under Sykes and thereby entitle a defendant to habeas relief for violation of his Sixth Amendment right,

so too with the ineffective assistance on the Fourth Amendment issue here. In all these situations the same Sixth Amendment values are equally implicated.

Even if viewed not under Strickland and Sykes but rather under Stone v. Powell, 428 U.S. 465 U.S. (1976), which we believe is inapposite since this is preeminently a Sixth Amendment case, the same result obtains. The purpose behind the Court's decision in Stone was to preclude duplicative litigation over Fourth Amendment claims in the federal courts where a full and fair -- even if incorrect -- resolution had been previously obtained in state court. Where, however, there has been no resolution of the Fourth Amendment claim in state court whatsoever, and where (under the reasoning of Strickland and of Cuyler v. Sullivan, 446 U.S. 335 (1980)) the defendant cannot fairly be held responsible for the default, the policies underlying Stone are simply inapplicable.

I. PRECLUSION OF HABEAS CORPUS REVIEW UNDER STONE SHOULD BE MEASURED BY THE SAME STANDARD AS SYKES AND UNDER BOTH STANDARDS RESPONDENT'S CLAIM IS NOT PRECLUDED

Amici fully agree with a key point suggested by the state, that there is, or should be, some correlation between the Stone preclusion test ("opportunity for full and fair litigation of a Fourth Amendment claim") and the Sykes "cause and prejudice" test. Thus, petitioners' first point is that consideration of the Fourth Amendment issue involved here but not raised below is barred by both Stone and Sykes, which each protect the integrity of the state's processes for examining constitutional violations.

It is only reasonable that there should be a correlation between the test applied to determine whether any constitutional claim not presented at trial is waived, or more accurately forfeited, under Sykes and whether a Fourth Amendment claim is lost because it

was not properly presented to the state courts under Stone. Similarly, deliberate disregard of state procedures for hearing any constitutional claim may be properly sanctioned under the tests established by this Court in the two cases noted.

But in their push for symmetry between the two concepts, petitioners end up by completely misstating the governing rule for procedural default, and produce a rule which has neither logic nor precedent to support it.

Petitioners argue, first, that the test for ineffectiveness under the Sixth Amendment (recently defined by this Court in Strickland v. Washington, supra) is different from and quite unrelated to the "cause" test under Sykes. Secondly, they say, the "cause" test would not under any circumstances be satisfied by conduct that met the ineffectiveness standard of Strickland.

Thirdly, they argue implicitly that whatever would be the rule under Sykes for determining the justification for the default should be true under Stone as well.

All parts of the argument fail, except for the third which leads to a different conclusion than that reached by petitioner.

A. Constitutional Ineffectiveness of Counsel Is "Cause" For The Failure To Take Required Procedural Steps Under Sykes.

Implicit in this Court's decision in Strickland is the proposition that most actions or non-actions made by a defendant's lawyer are binding on the defendant -- that the defendant ordinarily cannot later repudiate or disown them because he did not like how they turned out. Whatever tactics are chosen by the lawyer are generally considered those of the defendant whether he participated in the decision making process or not.

But if the lawyer's actions or non-actions are so far below the minimum standard required by the profession as to threaten the fairness of the proceeding, then the only meaning of constitutionally ineffective counsel is that they are no longer attributed to the defendant. If "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," Strickland, 104 S. Ct. at 2064, then the defendant can repudiate that conduct and separate himself from what his lawyer did or did not do. And he is entitled to a new trial where a lawyer can raise proper defenses on his behalf. That is precisely what constitutional ineffectiveness is all about.

Under those circumstances, ineffectiveness must be considered "cause" under Sykes. If the principle of Sykes is that

harmful consequences may attend certain procedural defaults in state and federal courts unless there is a good excuse for the default, then obviously the constitutional ineffectiveness of the defense counsel must be such a good excuse. The entire principle of ineffectiveness is that the defendant is to be "excused" from the actions of the lawyer taken under such circumstances. If he is to be excused generally (at trial and on appeal in both the state and federal systems), then he must be excused on habeas corpus as well, particularly under a rule that has a built-in excuse standard already in place, namely the "cause and prejudice" test of Sykes.

The key defect in the state's argument is the assumption that ineffectiveness of counsel under Strickland would not constitute "cause" under Sykes, so that a procedural default brought about by the constitutional

incompetence of an attorney would be visited on the defendant, and not excused, even if serious prejudice is shown by a habeas corpus petitioner. See generally Pet. Br. 20-28. It is certainly true that mere allegations of ineffectiveness are not sufficient to establish cause. Compare Pet. Br. 23. But petitioners have not cited a single case that holds that demonstrated ineffectiveness meeting the standards of a Sixth Amendment violation under Strickland would still not meet the cause standard under Sykes.

Merely to state the proposition in that form is to show its absurdity. A lawyer may be constitutionally ineffective under Strickland or United States v. Cronic, 80 L.Ed.2d 657 (1984), for a variety of

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[1] The cases cited dealing with whether lawyer incompetence not reaching the level of ineffectiveness may constitute "cause," see Pet. Br. 22 and 26-27 n.12, an issue now before this Court in Sielaff v. Carrier, No. 84-1554, are inapposite.

reasons: because he did not investigate the facts or because he did not know the law. See Strickland, 104 S.Ct. at 2066. If his constitutional shortcoming was that he did not know the law -- for example, that he did not know a particular defense was available or a particular constitutional right could be asserted -- then, by definition, he did not assert that legal defense at the proper time and presumably forfeited the defense. It is precisely that failure that made his legal conduct constitutionally ineffective. But under petitioners' theory, in a later habeas corpus proceeding that ineffectiveness would not excuse the state prisoner's failure -- or more precisely his lawyer's failure -- to take the proper steps in the state court trial.

To follow the logic of petitioner's argument that Sixth Amendment ineffectiveness is not cause under Sykes, one would have to

conclude that Sixth Amendment claims would have to be bifurcated into instances of factual ineffectiveness and legal ineffectiveness. Legal ineffectiveness claims would be resolved differently depending on whether they are heard on direct appeal or on federal habeas corpus. If a lawyer is totally incompetent and does not realize that his client has a clear and meritorious legal defense to the charges, and therefore fails to assert that defense, thereby forfeiting it in the state court proceeding, his client would be able to overturn the conviction under the Sixth Amendment only on direct appeal. Under petitioners' theory, however, he would never be able to assert the claim on federal habeas corpus because the ineffectiveness that produced the default is not "cause" under Sykes.

There is nothing in this Court's

decisions in Sykes or Strickland that supports such an absurd result.

Indeed, this Court's decision in Strickland at least implicitly rejects the entire argument. Strickland itself was a habeas corpus case. The lawyer in that case chose not to ask for a continuance at a death penalty sentencing or to ask for a psychiatric report on his client. He also decided not to investigate the possibility of certain psychological defenses available against the death penalty. His investigative and procedural choices were the basis for the Sixth Amendment claim made on federal habeas corpus.

Nowhere in its decison did this Court suggest that it would treat the procedural failures differently from the investigative failures or that there was a different test for ineffectiveness depending on the type of lawyer shortcoming or the stage at which the

ineffectiveness issue was raised. It treated the procedural failures on the merits of the Sixth Amendment claim, not as waived under Sykes. Yet if petitioners' argument were correct this Court should have made such a distinction.

It would be absurd and heartless to say to a defendant that the more serious the constitutional error his lawyer made -- so serious that his right to present it later to the state courts had been forfeited -- the more difficult it would be to correct the defect on federal habeas corpus. This Court's formulation of the ineffectiveness test in Strickland, which emphasized the importance of a "reasonably effective assistance" standard to preserve the Sixth Amendment right to counsel, is inconsistent with the idea that an entire class of cases involving gross legal ineffectiveness in failing to present legal defenses or

procedural errors may not be presented on habeas corpus. The state's argument boils down to a claim that lawyer incompetence at a constitutional level does not excuse the failure to take certain procedural steps which was itself the basis for the ineffectiveness claim. This Court should not accept such an absurd tautology, such a cruel Catch-22.

Amici have not found, and the state has not cited, a single case in which the lower federal courts have held that proof of constitutional ineffectiveness would still not constitute "cause" under Sykes.[2] See Cantone v. Superintendant N.Y. Correct. Facility, 759 F. 2d 207, 218 (2d Cir. 1985) ("To establish cause...petitioner must show that his counsel was ineffective for the

[2] The ACLU does not agree that only ineffectiveness constitutes "cause." See Brief for the ACLU Amicus Curiae in Sielaff v. Carrier, supra.

purpose of the sixth amendment..."); Gibson v. Spalding, 665 F.2d 863, 866 (9th Cir. 1981); Williams v. Nix, 751 F.2d 956, 960 (8th Cir. 1985); Jurek v. Estelle, 593 F.2d 672, 683 (5th Cir. 1977); Goldwin v. Balkcon, 684 F.2d 794, 808-809, n. 17 (11th Cir. 1982) The courts of appeal examining the issue all recognize the absurdity of attributing to the defendant the counsel's failings causing a default where those very failings are the basis for the claim of constitutional ineffectiveness.

B. If A Lawyer Is Constitutionally Ineffective In Not Presenting A Meritorious Fourth Amendment Claim, A Habeas Corpus Petitioner Has Not Had The Opportunity For Full And Fair Litigation Of That Claim Under Stone.

Once the proper Sykes rule is put in place, the analysis under Stone follows easily. This Court determined in Stone that "where a state has provided an opportunity for full and fair litigation of a Fourth

Amendment claim," a state prisoner cannot be granted habeas corpus relief on Fourth Amendment grounds, Stone, 428 U.S. at 494. But, by definition, where a defendant has been represented by a constitutionally ineffective counsel, the state has not produced a fair trial or a fair proceeding.[3] Under this Court's definition of ineffectiveness in Strickland, as noted above, 80 L.Ed.2d at 693, if the lawyer was ineffective in the constitutional sense, he was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," Strickland, 80 L.Ed.2d at 683, and there could not have been "full and fair litigation" of the Fourth Amendment claim in the state court proceeding.

Viewed from the perspective of the Sykes

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[3] This Court has unanimously held that the result is the same whether counsel is retained or appointed. Cuyler v. Sullivan, 446 U.S. 335 (1980).

rule, there should be no difference between forfeiture of a Fifth or Sixth Amendment issue or forfeiture of a Fourth Amendment issue because of lawyer ineffectiveness. The state argues that if a defendant's lawyer did not because of incompetence raise a meritorious Fifth Amendment claim (a claim that could with reasonable probability have resulted in the dismissal of the charges against him or in acquittal), then an ineffectiveness claim may be heard on federal habeas corpus. But if the lawyer failed to present a meritorious Fourth Amendment claim (which also could have resulted in the dismissal of all charges against him or in acquittal), then the defendant is said to be "stuck" with that failure. The special considerations relating to Fourth Amendment claims canvassed in Stone (the deterrent value of the exclusionary rule, the lack of a guilt or innocence issue, etc.), however, do

not become relevant when the central question is the lawyer's constitutional ineffectiveness. Then, as noted above, the lawyer's conduct is no longer attributed to the defendant, and the latter cannot be penalized because of what his lawyer did not do.

The petitioners' suggested regime has other manifestly illogical and unjust results as well. Stone plainly does not bar, and Strickland requires, state appellate court redress of the trial court counsel's ineffectiveness when the defendant is lucky enough to be assigned a new counsel to raise the ineffectivenss claim (resulting from the grossly incompetent neglect of a meritorious Fourth Amendment issue) on appeal. What reason can there be, then, for failing to grant the same relief to those unfortunate defendants who acquire competent counsel only thereafter?

In short, there is no reason to treat excusable defaults in the Fourth Amendment area differently from excusable defaults involving any other right. The default is excusable because, by definition, the lawyer's ineffectiveness did not produce a fair proceeding to begin with and deprived the defendant of his constitutionally mandated right to effective counsel. Viewed from the perspective of the Stone test, the defendant did not have the opportunity for full and fair litigation of his Fourth Amendment claim if his lawyer did not meet the constitutionally minimum standards required by Strickland.

II. STONE V. POWELL DOES NOT PRECLUDE HABEAS REVIEW OF A SIXTH AMENDMENT CLAIM THAT COUNSEL WAS INCOMPETENT FOR FAILURE TO RAISE A FOURTH AMENDMENT CLAIM.

This Court is being asked to rule that for purposes of habeas review defendants have a Sixth Amendment right to competent counsel

except when Fourth Amendment issues are involved. No matter how atrocious the attorney's performance, whether grossly negligent or, apparently, even if maliciously and intentionally collusive, habeas courts would be precluded from reviewing Sixth Amendment claims bottomed on Fourth Amendment issues. Petitioners seek not so much to extend Stone v. Powell as to carve an exception into the habeas review of Sixth Amendment claims provided in Strickland v. Washington.

Respondent presented a substantial and meritorious habeas claim that his lawyer acted with "unmitigated negligence". Notwithstanding petitioner's empty assertions that his invocation of the Sixth Amendment was a "camouflage" or "simple expedient" (Pet. Br. 15, 18), both the district court and the Court of Appeals found that respondent's counsel was "grossly

ineffective". Morrison v. Kimmelman, 579 F.Supp. 796, 802-3 (1984); Morrison v. Kimmelman, 752 F.2d 918, 919 (3d Cir. 1985). These findings were not issued as a "guise" or "circumvention" to adjudicate a Fourth Amendment claim (Pet. Br. at 19-20), but as recognition that respondent was unfairly victimized by a constitutionally ineffective lawyer. In any event, for determination of the principal issue presented here, the Court must assume the presence of both a Fourth Amendment and a Sixth Amendment violation. If such infringements of defendant's rights occurred, is habeas relief for the Sixth Amendment claim nonetheless unavailable?

Stone v. Powell in no way mandates that the federal courts ignore such a Sixth Amendment claim of gross ineffectiveness on habeas corpus review. Stone dealt with a fundamentally different question, enforcement

of the exclusionary rule through habeas corpus.

This Court has recently construed the exclusionary rule as a judicially created remedy designed primarily to deter police misconduct and thereby effectuate Fourth Amendment rights. The guarantee of effective assistance of counsel, however, is a personal constitutional right that directly protects a defendant. Indeed, of all the rights an accused person has, the right to effective counsel is the most "precious" because it "affects the ability to assert any other right he may have." United States v. Cronic, 104 S.Ct. 2039, 2044 (1984), citing Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1,8 (1956).

Similarly, mechanical application of the exclusionary rule adversely affects the truth finding process by excluding relevant and reliable evidence. But ensuring effective

assistance of counsel, by contrast, safeguards the integrity of trials and the adversarial system, "since access to counsel's skill and knowledge is necessary to accord defendants 'ample opportunity to meet the case of the prosecution....'" Strickland, at 2063.

Thus, this Court, after balancing costs and benefits, felt it could properly apply special limitations and standards to collateral review of exclusionary rule claims. Stone, 428 U.S. at 494-495. The Strickland Court, on the other hand, did not find the right to effective assistance of counsel susceptible to a cost-benefit analysis or special limitation:

> An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of th writ of habeas

> corpus, see [Engle v. Issac, 456 U.S. 107, 126 (1982)], no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Strickland v. Washington, 80 L.Ed.2d at 700.

Petitioners offer no compelling reason to carve an exception into the carefully balanced habeas review authorized by Strickland. The principal contention raised is really a speculation that a proliferation of repackaged Stone claims will swamp the courts, making it difficult to differentiate true Sixth Amendment claims of unreasonably incompetent lawyering from figleaf petitions designed primarily to relitigate (or litigate in a preferred federal forum in the first instance) Fourth Amendment issues.[4] So far,

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[4] One commentator has observed that the formulation of habeas claims iin terms of inadequate assistance of counsel does not simply repackage old problems in different wrappings:

> The courts have drawn substantial distinctions between simple counsel failure or error, on the

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however, the courts have articulated no such problems, or any difficulty in isolating the Sixth Amendment question from the Fourth Amendment backdrop. See, e.g., Satchell v. Cardwell, 643 F.2d 408, 410 (9th Cir. 1981) (failure to make "close" suppression motion that "might have been successful" did not constitute ineffective assistance "in context" of other aggressive actions taken by attorney); Ryder v. Morris, 752 F.2d 327 (8th Cir. 1985) (merits of suppression motion not addressed because counsel's reasons for not moving demonstrated competence).

Petitioners further argue that state

> one hand, and ineffective assistance, on the other...If [many habeas petitioner prevail because] counsel are in fact failing to perform duties deemed so basic that they will serve to reopen an otherwise final judgment, perhaps it is just as well that the system's failure be laid directly to the real cause where it can be confronted more directly.

Strazzella, Ineffective Assistance of Counsel Claims: New Uses, New Problems, 19 Ariz. L. Rev. 483 (1977).

officials will regard a successful Sixth Amendment claim in a federal habeas court with "dismay," "rancor," and "cynicism" where it involves even tangentially a post-Stone consideration of a Fourth Amendment claim. (Pet. Br. 20). But this argument insults the intelligence and responsible judgment of state officials, who can certainly be expected to discern the difference between relitigation of Fourth Amendment claims and fresh consideration of Sixth Amendment claims previously unraised (or never properly raised) based on constitutionally ineffective representation. In fact, one can reasonably expect that incompetency reversals for these few Fourth Amendment claims handled in a manner failing the Strickland standards will help in some measure to identify, define, and deter incompetent practice, raise the general level of lawyering, and remove incompetent lawyers from the rolls of the bar. Indeed,

if the lack of pre-trial preparation and "unmitigated negligence" found in this case is immunized from habeas review just because a Fourth Amendment claim was involved, it unnecessarily increases the risk that future defendants will be victims of similar ineptitude.

This case does not turn, however, on whether incompetency reversals will have a salutory effect on the performance of lawyers generally. The basic issue is one of fundamental fairness. See Strickland, 80 L.Ed.2d at 694. Unlike the typical Fourth Amendment claim barred by Stone, respondent's meritorious Sixth Amendment claim does ask society to determine an issue which bears directly on the "basic justice" of the petitioner's incarceration. Stone, 428 U.S. at 494, n. 31. A proceeding is fundamentally unfair when there has been a "breakdown in the adversarial process that our system

counts on to produce just results." Strickland, 80 L.Ed.2d at 699. When the Sixth Amendment's promise of effective counsel has truly been broken, the federal courts must not ignore such a claim on habeas review just because it involves a Fourth Amendment issue. If, in fact, respondent has been convicted without "effective assistance of counsel", there is no warrant in the federal habeas statute's guarantee of relief, reaffirmed recently in Strickland, for denying habeas corpus.

III. PRECLUSION OF HABEAS CORPUS REVIEW IS NOT REQUIRED UNDER STONE IN THIS CASE SINCE THE STATE COURTS NEVER PASSED ON THE UNDERLYING FOURTH AMENDMENT ISSUES.

A key part of the rationale underlying Stone v. Powell was the recognition that state courts were "fair and competent forums for the adjudication of federal constitutional rights." 428 U.S. at 493, n. 35. Thus, in the Fourth Amendment area, it

was not necessary to have two bites at the constitutional apple, since guilt or innocence issues were seldom if ever implicated on a search and seizure question. Consideration of Fourth Amendment claims by one set of courts -- namely the state courts where the issue is first raised -- was sufficient.

Furthermore, this Court expressed the view that the deterrent effect of the exclusionary rule was "dubious" on federal habeas corpus. "The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search and seizure that went undetected at trial and on appeal." 428 U.S. at 493.

Neither of these considerations applies when the state courts never passed on the underlying Fourth Amendment issue because the

ineffectiveness of the defendant's lawyer at the state trial has forfeited the Fourth Amendment claim. There is no question in cases such as this of affording a second bite at the apple; nor, assuming that the forfeiture of the Fourth Amendment claim was caused by ineffective assistance of counsel (and not by deliberate bypass), can respondent be charged with responsibility for the absence of such state court consideration. If the petitioners' argument is adopted that ineffectiveness does not excuse the failure to raise a meritorious Fourth Amendment claim in the state courts, then no court anywhere will have assessed the law enforcement officers' conduct under the Fourth Amendment. There is nothing in this Court's opinion in Stone that supports the idea that that decision was meant to sanction the avoidance of both state court and federal court constitutional review of the state

officers' conduct in a situation not of the defendant's making.

Furthermore, the effect of denying federal habeas corpus review of Fourth Amendment claims that have been lost in the state courts because of lawyer ineffectiveness is to wipe out the entire deterrent value of the Fourth Amendment exclusionary rule in these cases. It is no longer a question of the "additional" deterrent effect that the exclusionary rule affords on habeas corpus after the state courts have considered the issue. Rather, the entire rationale of the exclusionary rule disappears, even for the most egregious officer misconduct, if no court anywhere is allowed to consider a meritorious Fourth Amendment claim because of the constitutional ineptness of the defendant's lawyer.

Stone suggests simply that, the Fourth Amendment claim having once been examined by

the state courts, there is no longer an overriding necessity for duplicative federal habeas review. The Court's discussion of the diminished deterrent effect of collateral federal habeas corpus review specifically discussed review of issues "that went undetected" in the state court system, that is, that were passed on by the state courts but where relief was not but should perhaps have been granted. It is a totally different situation when the state courts never passed on the Fourth Amendment issue because of conduct, which, by definition, was constitutionally deficient, did not produce a fair, adversarial proceeding, and could not be attributed to the defendant.

The lower federal courts have been extremely reluctant to permit defaults in the state courts to wipe out any chance for federal courts to consider the Fourth Amendment legality of the officers' conduct

and thus to lose all chance for any court to pass on the issue, thereby losing any and all deterent effect of the exclusionary rule. Thus in Boyd v. Mintz, 631 F.2d 247 (3d Cir. 1980), state rules required that suppression motions had to be made not later than 30 days after arraignment. In that case, a public defender was appointed on the last day of the 30-day period and could not make a timely suppression motion. This "breakdown" in the state system did not preclude later federal court consideration of the Fourth Amendment claim.

Similarly, in Riley v. Gray, 674 F.2d 522 (6th Cir. 1982) cert. denied sub nom. Shoemaker v. Riley, 51 U.S.L.W. 3301 (October 19, 1982) (White, J., dissenting from denial of cert.), the state courts had found that the defendant lacked standing to complain about the search of an apartment. Thus the state appellate courts never examined the

merits of the Fourth Amendment claim, i.e., whether the state officers' actions in conducting the search violated the Fourth Amendment. The Sixth Circuit found that the state courts were incorrect in their determination of lack of standing and then reached the merits of the claim, noting that the incorrect ruling on standing deprived the defendant of any chance to prove a Fourth Amendment violation.

In both cases, the effect of the state court's analysis was to deny any opportunity to examine the legality of the officer's conduct under the Fourth Amendment. This result, the federal courts found, was contrary to the theory of Stone which emphasized the undesirability of two levels of review of Fourth Amendment claims, but was never meant to preclude review by either system entirely.

IV. A REMAND IS NECESSARY TO DETERMINE WHETHER THE FAILURE TO MAKE A TIMELY SUPPRESSION MOTION WAS PREJUDICIAL

The state argues in its final point that the state court's suggestion that suppression of the bed sheet evidence would not have affected the result was a finding of fact to which the presumption of correctness applies. In effect the state is claiming that the state finding of lack of prejudice must be accepted by the federal courts.

This Court's decision in Strickland is squarely to the contrary. This court made clear that the issue of prejudice is a mixed question of fact and law to which the presumption of correctness does not apply, see 80 L.Ed.2d at 700. By taking an off-hand comment of the trial judge that "the sheet was just one small phase of the whole case," see 752 F.2d at 923, n. 2, petitioners are trying to by-pass this Court's ruling and disguise a legal conclusion as an issue of

fact. The court below properly remanded the case for a fuller determination by the district court of the application of the new Strickland rule -- and in particular, for an assessment of prejudice.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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